No. 2503

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HAMMOND,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR THE UNITED STATES

JOHN W. PRESTON,
United States Attorney for the Northern District of California.

FRANK HALL,
Special Assistant to the Attorney General.

Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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Synopsis and Index.

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STATEMENT

In this brief, we adopt the practice followed by plaintiff in error of designating A. B. Hammond as defendant and the United States as plaintiff.

The statement made by counsel for the defendant is, on the whole, fair; but it contains many conclusions, deductions and inferences not warranted by the record. It would serve no good purpose to review these errors in detail because many of them are wholly immaterial. Wherever such deductions are not warranted by the evidence, and are material, we shall discuss them under the proper topic.

BRIEF

I. THE DEFENDANT IS LIABLE FOR THE CONVERSION.

A. The instructions given by the Court.

"This is an action by the Government to recover from the defendant, A. B. Hammond, the value of a large quantity of lumber—stated in the complaint to amount to 21,185,410 feet, board measure—the property of plaintiff, alleged to have been appropriated and converted by defendant. In that respect it is alleged by the plaintiff that this lumber before its manufacture was in the shape of timber standing and growing upon certain public lands belonging to plaintiff described in the complaint, and that while so standing upon plaintiff's said lands and the property of plaintiff, the defendant unlawfully and without right entered upon said lands, and cut down and felled it, carried it away and manufactured it into lumber, and sold and converted it to his own use and that of certain corporations named in the complaint. That is to say, the complaint alleges, in substantive effect, not that the defendant individually and unaided took this great quantity of lumber for and by himself alone, but that it was done through the instrumentality of the corporations named of which it is alleged the defendant was at the time the general manager, directing their business and operations in that regard, and that it was in this capacity that defendant committed the acts complained of through the aid and assistance of such corporations, and by that means converted the lumber to his own use and that of said corporations, whereby it was wholly lost to the plaintiff. It is charged that the acts of the defendant in taking and converting the lumber were committed wilfully and knowingly and

with full knowledge that it was the property of plaintiff, and that neither defendant nor said corporations had any right whatsoever thereto.

"Should you find these allegations of the complaint to be true; that is, should you find that plaintiff's lumber in the quantity alleged, or in any less quantity, has been taken by the defendant for the purpose and under the circumstances counted upon, then under the law plaintiff will be entitled to a verdict against the defendant for the entire quantity of lumber so taken. This is so because the manner of the alleged taking and appropriation, if true, constitutes what is known in the law as a trespass or tort, in other words, a wrongful taking of property, and in such form of action each individual engaged in the wrongful act complained of is personally responsible for the whole amount of damage suffered through such wrong, no matter how many may have participated or been concerned therein and whether he has himself benefited much or little by such wrong. The law does not undertake to apportion between a number of persons engaged in a tortious or wrongful act the extent of each man's individual responsibility as between themselves; they are left in that regard where their acts leave them. It gives to the party injured by the wrong a right of action for its redress, and where the act is committed by more than one, he may sue one or more or all as he sees fit and recover the entire loss to which he has been subjected from the one or more he elects to sue. It will not be material in this case, therefore, should you find that plaintiff's property has been taken by defendant in the manner alleged, whether the defendant reaped the whole or only part of the fruits of such taking; he would be responsible to plaintiff in either event for the entire loss suffered by it, precisely as if he had received

all the benefit therefrom. On the other hand, the party injured has under the law but one right of action for the wrong, and if he elects to sue one of a number of wrong-doers or joint tort-feasors, as they are termed in the law, and fails to secure full redress, his right is at an end and he cannot then resort to further action against the others.

"You will understand, in determining defendant's responsibility, that the mere fact that the defendant happened to be a stockholder or an officer of a corporation which may have been guilty of converting the lumber in question, and of which he may have received a part of the benefit, would not of itself, in the absence of some showing of his personal participation in such conversion, render him individually liable therefor. There must appear some act on his part disclosing an intent and purpose to aid and assist in such wrongful act of a character to show that he was aware of the purpose intended to be accomplished. Participation, in the sense here employed, does not mean a mere passive acquiescence in the acts of others when no active aid is given or encouragement lent to the commission of the wrong. In other words, to make the defendant liable, the evidence should show, not only that the lumber in question was the property of the United States, but that the defendant Hammond either directly or through his agents, or jointly with some other person, did some act which was inconsistent with such title and right of possession of the plaintiff and tended to some positive extent to deprive it wrongfully of its property. If any such acts by the defendant are shown by the evidence, then the defendant is liable.

"If you find that any of the timber for the conversion of which the action is brought, belonging to the United States, was taken and

converted by W. H. Hammond, sometimes called Henry Hammond, or G. W. Fenwick, or Fred Hammond, or any of the corporations named in the complaint, but without the aid, connivance or participation of the defendant in any manner, then although the proceeds of such conversion or some part thereof may have been subsequently paid to or came in the course of business to a corporation of which the defendant was a stockholder or officer, the defendant would not be liable for timber or its proceeds so converted. But if you find that timber so taken and converted, although ostensibly taken in the name and for the benefit of said parties named, or any of them, was in fact taken for the benefit of defendant and his associates, with the aid, connivance and at the direction of the defendant in the manner alleged, then the defendant would in law be a participant in such taking and would be personally liable therefor, no matter where the proceeds eventually went. Any act of wilful interference with property such as that sued for herein, without lawful justification, whereby the person entitled thereto is deprived of its possession, is a conversion. A person may be guilty of a conversion of property without himself personally and directly performing the act of taking or carrying it away. If it is taken by his aid and connivance or at his instigation or direction, although the physical taking is by and in the name of others and without his immediate presence, he is nevertheless responsible as a participant.

"The theory advanced by the plaintiff in this case as to the method pursued in the alleged conversion is that the lumber sued for was taken as the result of a continuing series of acts covering a number of successive years, but all a part and parcel of one general unlawful scheme and arrangement entered into between the de-

fendant and his associates under the guise and form of different corporations organized by them with the intent, and designed to accomplish their purpose, of appropriating such lumber; and that the operations to that end were carried on by such corporations by the means of establishing different mills and logging camps in the names of, or conducted by, different individuals or corporations, but all in fact connected and acting in concert, and all under the general direction and management of the defendant for said corporations. Not that the defendant was absolutely in control of such corporations or nominally their general manager, but that the operations carried on to take and appropriate the plaintiff's lumber were in a general way under defendant's direction and control. If you find that this theory is sustained by the evidence, it would establish an unlawful taking and it will not be material to the defendant's responsibility that he should be shown to have been immediately present on each occasion that lumber was taken and personally directing the operations. It will be sufficient if it appear that any lumber so taken was cut and carried away as a result of the general directions or instructions of the defendant in pursuance of such concerted plan, and was subsequently appropriated by defendant for the benefit of himself and the corporations named with a knowledge that it was the property of the plaintiff.

"In determining the truth of this theory, you may consider the relationship, if any, by blood, marriage or otherwise, shown to exist between the defendant and those immediately employed or engaged in the mills and logging camps in taking off the timber during the period involved from the lands in question, and all other facts and circumstances shown which in your judg-

ment tend to throw light upon the question of the defendant's responsibility in the premises."

B. The instructions refused by the Court.

I. "The fact that the defendant happened to be a stockholder or an officer of a corporation, which corporation may have been guilty of conversion, does not, of itself, in the absence of his personal participation in such conversion, render him individually liable therefor."

II. "One does not become liable merely because he does not endeavor to prevent an act of conversion."

III. "In order to maintain this action, the plaintiff must prove that the timber in question was its property, and that while it was the property of the plaintiff it came into the possession of the defendant who converted it. If you find that the defendant never came into possession of the timber, and never purported to assume or assumed control over it, then your verdict must be for the defendant."

IV. "I instruct you that, even if you find that timber was converted, and that the proceeds derived from the sale of the same were paid over to the Missoula Mercantile Company in payment of debt, that this circumstance would not of itself render either the Missoula Mercantile Company, or any of its officers or stockholders liable. Before the defendant Hammond can be held liable for conversion of such timber, he must have personally planned or have personally directed the cutting of the particular timber converted, or he must have dealt personally, or through agents personally directed by him, with the possession or disposition of such timber after it was cut."

V. "If you find that any of the timber, for the conversion of which this action is brought,

belonged to the United States, and was converted by Henry Hammond, G. W. Fenwick, or Fred Hammond, the Montana Improvement Company, the Blackfoot Milling and Manufacturing Company, or the Big Blackfoot Milling Company, and that, pursuant to the instructions of said persons or corporations, or either of them, the purchase price which was received for such timber so converted was paid to any corporation in which the defendant was a stockholder or officer; yet, as matter of law, I instruct you that this does not entitle the plaintiff to maintain this action against the defendant, or does this constitute a conversion by defendant of the plaintiff's property."

VI. "I instruct you that the evidence offered in this case is not sufficient to justify the rendition of a verdict against the defendant in this action, and therefore I direct you that you return a verdict in favor of the defendant."

X. "A. B. Hammond appears to have been a director of the Big Blackfoot Milling Company, and a stockholder therein. It is admitted by the defendant here that one Boyd, while employed by the corporation, entered upon a certain eighty acres of land in Section 22, Township 14 north, Range 14 west. Now, although this act may have been innocent, the corporation which employed Boyd would be responsible for the taking, even though it had given Boyd express directions to be careful and keep within the lines of the property upon which the corporation had a right to cut, and even though it was entirely ignorant that Boyd had gone beyond those lines on to property of the Government. But the question for you to decide is not whether the corporation would be responsible, but would A. B. Hammond be responsible, and, in such connection, I instruct you that A. B. Hammond would not be responsible unless

he had personally participated in directing Boyd to cut this particular timber, or unless, after the timber was cut, he had personally participated in its possession, sale, or disposition. Even a knowledge upon A. B. Hammond's part that Boyd was an employee of the corporation and was cutting timber for the corporation, would not of itself be sufficient to justify a verdict against the defendant. Before the defendant can be held liable for Boyd's cutting, the defendant must in some manner have actually participated in the unlawful act of Boyd."

XI. "If you believe from the evidence that Henry Hammond, during the period while the Edgar claim was cut, was the sole owner of the Bonner mill, and that the defendant did not participate in the cutting of the timber from said claim, or in the manufacture of it into lumber, or in the sale or disposition thereof, then I instruct you that the defendant would not be liable for the conversion of said timber."

XII. "If you find from the evidence that timber was cut from Lot 10, in Section 18, by the Big Blackfoot Milling Company at a time when said corporation had a permit to cut over the adjoining property, and over a very large area of the public domain in addition thereto, and if you find that the said timber was cut contrary to the directions of the said corporation, by some of its employees, then I instruct you that the said corporation nevertheless would be liable for the taking thereof. But again the question arises: Would the defendant, A. B. Hammond, a director and stockholder in the said corporation, be personally liable? The answer is that he would not be liable unless you find from the evidence that he personally participated in the taking of the said timber. If he knew nothing about the taking thereof, and took no personal part therein, he would not be

liable, although the corporation in which he was a stockholder and director would be liable."

XIII. "Before you can hold the defendant liable for the conversion of any timber that may have been taken from public lands and sawed at the Bonita mill from the Hellgate country, it will be necessary for you to find either that A. B. Hammond was a principal or an agent in the acts of trespass from which the conversion has resulted. If you find that A. B. Hammond at no time had any interest, either direct or indirect, in the Bonita mill while the same was operated by Fred A. Hammond or George W. Fenwick, and that he did not in any manner participate in the cutting of the timber, or in the manufacture and sale thereof, then I charge you that A. B. Hammond is not legally liable for the taking thereof."

XIV. "If you find from the evidence that the Montana Improvement Company erected the Bonita mill and sold the same to Fred A. Hammond, and that Fred A. Hammond in turn sold the same to George W. Fenwick, and that from and after the time of the said sale neither the Montana Improvement Company nor the defendant A. B. Hammond had any interest whatsoever in the said mill, then I charge you that the said Montana Improvement Company would not be liable unless it were shown by a preponderance of the evidence that prior to the sale to Fred A. Hammond it had cut logs upon some portion of the land involved in this action. Whether or not there is any evidence in the record to the effect that the Montana Improvement Company ever cut any logs is a question for the jury. But even if the Montana Improvement Company should be found by you so to have cut timber, then the defendant would not be liable for such cutting merely because he was the owner of a portion of the stock of

the Montana Improvement Company, or was an officer thereof. As already said to you, in the case of a corporation, a stockholder or officer is not personally liable in conversion merely because he is a stockholder or officer. He is liable only in case he has himself personally participated in the conversion, and then he is held liable in law not because of the fact that he is a stockholder or officer; that fact has nothing to do with the question. He is liable in such case because of his personal participation in the conversion."

C. Who liable for conversion.

Counsel for defendant take the position that under the law, the defendant did not sustain such relation to the conversion as to make him liable therefor. They say there was no evidence to show that he was agent for any of the persons or corporations actually engaged in the cutting or conversion of the timber, that he did not directly derive any profit therefrom and the mere fact that he was an officer and director of the corporations concerned is not sufficient to fasten liability upon him. It is well settled that one who participates by instigating, aiding or assisting another is liable in trover. This was the theory on which the Government's case was framed and tried, and the theory adopted by the Court in its instructions, which fairly and fully submitted to the jury the question as to whether or not the defendant did instigate, aid or assist others in converting the timber from the lands described in the complaint.

"Every person is liable in trover who per-

sonally or by agents commits an act of conversion, *or who participates by instigating, aiding, or assisting another, or who benefits by its proceeds in whole or in part.*" (Italics supplied.) 38 Cyc. 2054-2055.

In the case of *Longfellow* vs. *Lewis,* 15 Fed. Cas. No. 8487, 2 Hark. 256, the Court said:

> "All who are concerned in such transactions, thus interfering and dealing with the property of another, so that the same is lost to its true owner, are clearly accountable to him for its value, and are guilty of a conversion of the property."

And in the same opinion it is also said:

> "If by the acts of defendant the plaintiff has been deprived of his goods, it is wholly immaterial whether the defendant did or did not profit thereby."

See also:

U. S. vs. *Humphries,* 149 U. S. 277; 37 L. Ed. 734.
U. S. vs. *Baxter,* 46 Fed. 350, 353.
U. S. vs. *Taylor,* 35 Fed. 484, 486.

The case of *Cone* vs. *Ivison,* 35 Pac. 933, considered very fully the question as to who may be liable for conversion. On page 938 the Court said:

> "It necessarily results from what has been said, in connection with what we will hereafter state, that the allegation of the sale sets forth that character of sale which was, as against the plaintiff, a tortious conversion of the property by the parties making the sale; and here we are met with this contention: 'It is believed

to be beyond question, as a legal proposition, that there cannot be a conversion of personal property without possession. There is not a word in the petition to show that defendant ever had possession of the property. Therefore, he could not be guilty of a tortious conversion thereof.' In answer to this, I have but little to say. It is an astonishing proposition as applied to the facts of this case, as we view the facts. Lawrence & McGibbon did an act which was a tortious conversion of personal property as against the plaintiff. They did this act at the 'instigation' of defendant, who had full knowledge of plaintiff's rights. How, then, can it be seriously asserted for one moment that the defendant is not guilty of precisely the same offense, the same trespass, the same wrong, which Lawrence & McGibbon were guilty of? It is useless to discuss the matter; the true doctrine is so entirely elementary. At page 36 of the fourth book of Blackstone's Commentaries, the distinguished author states: 'In treason all are principals *propter odium delicti.* In trespass all are principals because the law, *"quae de minimis non curat,"* does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim that *"accessorious sequitur naturam sui principalis,"* and therefore an accessory cannot be guilty of a higher crime than his principal, being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though had he been present and assisting, he would have been guilty as principal of petit treason, and the stranger of murder.' If, under the law, one who instigates another to the commission of a crime is guilty as principal, how can it be doubted that one who instigates another to the commission of a civil wrong is

> as completely a principal as he would have been had he actually performed the wrongful act himself? *Henderson* vs. *Foy* (Ala.), 11 South. 441-442."

In the case of *Clark* vs. *Whitaker et al.,* 19 Conn. 319, the Court on pages 327-328 said:

> "With respect to the defendant Hall, although it was not shown that he was personally engaged with the defendant Clark in the acts of taking possession and using, consuming and disposing of the property, it was satisfactorily proved, by the testimony of William Clark, if it was entitled to credit, that he cooperated with that defendant in those acts, by aiding and abetting him in doing them, and by his subsequent recognition, approval and adoption of them. * * * * Other circumstances also, which need not be detailed, supported the claim that Hall cooperated with the defendant Clark. No argument is necessary to show that the testimony of this witness, if credible, was abundantly sufficient to prove a combination between them."

In discussing the liability of the defendant Whitaker in the same case, the Court on pages 328-329 said:

> "The testimony adduced to show that the defendant Whitaker acted with the other defendants in the conversion of the property, is by no means as satisfactory as that relating to them. That there was evidence, however, conducing to prove that he cooperated with them, cannot be questioned. There was nothing to show that he had any active personal agency in the taking of the property, or the subsequent use or disposition of it; but various circumstances were stated, by the witness Clark, which tended to

evince that he advised and assisted in the measures which the plaintiff claimed to have proved were taken, for the purpose of enabling the defendant Clark to obtain possession of it; that the acts constituting a conversion of it were done, at least in part, for his benefit; and that he subsequently approved and adopted them. * * * * It was all properly submitted to the jury, whose province it was to determine its credibility and weight. The court are not of opinion that their verdict is so manifestly wrong, in this respect, that it is our duty to disturb it."

D. The evidence of the defendant's participation in the conversion.

It is the contention of the Government that the defendant so far participated in the conversion by instigating, aiding and assisting the others as to render him liable. The instructions of the Court were clear and positive that he could not be held liable unless the jury believed, from a preponderance of the evidence, that the timber in question was converted with the aid, connivance and direction of the defendant. The jury evidently was convinced by the evidence that the defendant did aid, connive and direct the operations of the several corporations which received the benefit of the conversion.

Counsel for the defendant in their brief dwell at length upon the clear and positive testimony offered on behalf of the defendant to the effect that the defendant was not solely in charge of the cutting of the timber, but that he was merely a stockholder and officer in the several corporations concerned.

We submit that the testimony offered on the part of the plaintiff was sufficiently clear and convincing of defendant's knowledge, participation and assistance in the conversion to fully warrant this Court in sustaining the judgment. The evidence as a whole shows that he was not only one of the largest stockholders in the Montana Improvement Company, the Blackfoot Milling and Manufacturing Company, the Big Blackfoot Milling Company and the Missoula Mercantile Company, but that he had supervision and direction of the affairs of these corporations and the cutting and conversion of the timber in question, and that he was personally and directly responsible for the acts complained of. If it had not been for his assistance, through his relations with the organization and conduct of these corporations, we submit that the timber in question would never have been converted. The record in this case abounds with instances of his personal conduct and supervision and direction of the men who were employed in cutting and sawing the timber. We shall not burden the Court with going into all of these circumstances, but content ourselves with pointing out the more prominent facts which support our contention.

William Greene testified (Tr. p. 79) that he was employed to work in cutting timber in the Big Blackfoot country in 1887 by A. B. Hammond. He dwells at length on the logging operations which were conducted in the cutting of the timber in question, and said (Tr. p. 80) that he supposed that he

was working for Mr. A. B. Hammond. With respect to the manner in which he was paid for his services, he said (Tr. pp. 81-82) that during all the time he was working in the Blackfoot country, he was paid for his services by checks on a concern supposed to be the Missoula Mercantile Company; that these checks were paid by the Missoula Mercantile Company in its office in Missoula. Upon cross-examination, he said (Tr. p. 83): "When I was employed in the Blackfoot country, Mr. A. B. Hammond hired me right at Missoula. When I was employed by Mr. A. B. Hammond, I went up to him and asked him if he wanted any more men in the woods, up at the camp. He said he did and took my name down and I went up and went to work. He told me to go to headquarters camp. I don't recollect ever seeing Mr. W. H. Hammond up there in the woods." Further, on cross-examination, he said (Tr. p. 84): "I said in substance: 'Do you want any more men to go up in the woods?' and he (A. B. Hammond) said 'yes' and put my name down." On redirect examination he said he went to the State of Montana at the instance of Mr. Thomas Hathaway.

Mr. R. K. McLaughlin, one of the plaintiff's witnesses, testified that during all the time he was working in the timber in the Blackfoot country, he was paid by the Missoula Mercantile Company (Tr. p. 87). He also testified (Tr. p. 88) that one time while working in the Blackfoot country, he was sent down to Missoula with some horses that had been used in the logging operations. He placed the horses in A.

B. Hammond's barn and Mr. Hammond told him to fix the horses up for sale. On cross-examination, he testified that he had seen Mr. A. B. Hammond in the woods on the Blackfoot at one time and that the circumstances were such that he judged Mr. Hammond was up there on a general tour of inspection. He further testified (Tr. pp. 89-90) that while he was working in the Blackfoot country, his time was all forwarded to the Missoula Mercantile Company, and that when he wanted money, he applied to John Keith in the Missoula Mercantile Company's store. On direct examination, he testified (Tr. p. 91) that it was Mr. A. B. Hammond who told him the price at which the horses that were sent in from the Blackfoot country were to be sold, and (Tr. p. 92) that his talk with Mr. A. B. Hammond about the horses was to the effect that he was to put the horses in the barn, clean them up, take care of them and get them ready for sale, and that Mr. A. B. Hammond told him the price at which the horses were to be sold.

Sydney C. Mitchell (Tr. p. 93) was employed by Mr. Hammond to work at Wallace for the Eddy-Hammond Company about May or June, 1886. During the year 1887, he was employed as shipping clerk at the Bonita mill. All of the statements of the shipments of lumber were made out by the witness and mailed to the Missoula Mercantile Company. This practice was continued throughout the year 1887. In 1889 he was employed at the Bonner mill. The shipments of lumber were made in the name of W. H. Hammond or Hammond & Company. The

invoices were made regularly in the mill and forwarded to the Missoula Mercantile Company, to the lumber office. This lumber office was in the Missoula Mercantile Company's establishment. From the fall of 1887 until January, 1888, the witness was employed in the lumber department of the Missoula Mercantile Company. He was assistant to Mr. Winstanley in that office. It was located in the office and store of the Missoula Mercantile Company—the same room. The relation of both the Bonita and Bonner mills and the authority exercised indiscriminately by both A. B. Hammond and Henry Hammond, is well illustrated by the testimony of the witness (Tr. p. 97) where he says that during 1885, Mr. Henry Hammond sent him to the Bonita mill to take care of the books there. This witness was always paid by orders on the Missoula Mercantile Company (Tr. p. 97); he was not paid by time check, but was given such orders during all the time he worked at the Bonita mill (Tr. p. 98). The witness, Fenwick, attempted to testify that all of his transactions regarding the lumber manufactured at the Bonita mill were carried on independently of the Missoula Mercantile Company, but this witness testified (Tr. p. 100) that the lumber was shipped direct to the mines at Anaconda and that the bills showing the contents of cars shipped were transmitted to Missoula. He testified that the men employed by Mr. Fenwick at the Bonita mill were paid with orders on the Missoula Mercantile Company (Tr. p. 105). The regular monthly payroll was made out and sent down to the Missoula Mer-

cantile Company's store. The billing of the lumber and collecting therefor was done from the Missoula Mercantile Company's store (Tr. p. 106).

Felix Cyr saw Mr. A. B. Hammond about the Bonita mill during the time he was employed there (Tr. p. 110). He gave the witness instructions in regard to his employment about the mill. One time when Cyr was working in the place of his father, the defendant inquired of him why his father was not driving the team and instructed the witness not to work any more, but to have his father take charge of the team. He further testified (Tr. pp. 111-112) that the defendant used to come to the mill occasionally, and the witness understood that Mr. A. B. Hammond was the head man at the mill. He received time checks on the Missoula Mercantile Company for his services.

William A. Cook testified (Tr. p. 123) that Mr. Eddy, of the firm of Eddy-Hammond & Company, was in charge of the work of installing the mill at Bonita, that Mr. A. B. Hammond was a member of that firm and was at the mill site several times while the witness was constructing the siding. He also overheard a conversation (Tr. p. 132) between Mr. A. B. Hammond and a man named Ritz with respect to some logs that had been cut by Ritz supposedly under a contract with Hammond, but which Ritz had afterwards sold to other parties. Hammond finally received the logs.

Milton Hammond, a distant relative of the de-

fendant, testified (Tr. pp. 139-140-141) that he was sent up in the Blackfoot country in September, 1887, by A. B. Hammond, and that his wages were paid by a check on the Missoula Mercantile Company. He further testified (Tr. pp. 147-148) that he had seen Mr. A. B. Hammond at the Bonita mill on his tours of inspection.

James Van Keuren testified (Tr. pp. 149-151-2-3-4) that he was induced to go from the State of Idaho to Missoula, Montana, by Thomas Hathaway, who took him to the office and introduced him to Mr. A. B. Hammond. Mr. A. B. Hammond inquired in regard to his capabilities as a workman and then employed him to work at Wallace. He sent him there with a letter to Henry Hammond who had no work for him at Wallace, but secured employment for the witness at Bonita in the fall of 1885. At that time the mill had already been established on Section 14 in the Hellgate River country. He was paid for his services in the office of the Missoula Mercantile Company, sometimes in cash and sometimes by check. In 1886 he had a contract to deliver logs to the Bonita mill. This contract was brought about by the efforts of Mr. Hathaway, who induced Mr. Fenwick to employ the witness. In order that he might be able to fulfil his contract, it became necessary for him to purchase a number of horses. With respect to the purchase of these horses, the witness said (Tr. pp. 151-152): "As to these horses, I got one pair at Bonita from Mr. Fenwick and I got two more horses through Mr. Hammond in Mis-

soula, bought one direct from Mr. A. B. Hammond and Mr. Hammond got me the other one. I gave Mr. Hammond credit on the amount they owed me for the horses that Mr. Hammond turned over to me on the contract under which I had been logging." Witness further said that the Missoula Mercantile Company supplied him with tools and supplies and he paid for them out of the money that was coming to him from this logging contract. From the testimony given by the witness (Tr. pp. 152-3), it appears that this contract was made entirely by Mr. Hathaway, but that the logs were delivered to the Bonita mill which was then being operated by Mr. Fenwick. After he completed this contract in the spring of 1886, he called upon Mr. A. B. Hammond at the office of the Missoula Mercantile Company in Missoula, and Mr. Hammond sent him up to the Blackfoot River to drive a team. His testimony on page 154 shows clearly that his contract for logging to the Bonita mill in 1886 was made directly with the Missoula Mercantile Company.

Patrick Joyce testified (Tr. pp. 156-9) that he was employed in cutting timber in the Blackfoot country in 1885 and 1886, and was paid for his services in supplies by the Missoula Mercantile Company, that he was given an order by Mr. Henry Hammond for the balance due him for his services on the mercantile store at Missoula. While he was working for George Hammond at the Fish Creek camp, he saw A. B. Hammond on the drive in the spring of 1886. At that time he heard a conversa-

tion between A. B. Hammond and George Hammond concerning the employment of men in the logging operations. At that time quite a few men were quitting and being discharged and they were short handed. In this conversation A. B. Hammond told George Hammond that if this condition was not remedied that George Hammond would be relived from his work there.

John Graham stated (Tr. pp. 161-2) that he was employed in logging in the Blackfoot Valley in 1886. He worked a while in the different camps under men who were employed in logging and driving the logs to the Bonner mill. He did not know to whom these camps belonged, but his services were paid for with orders on the Missoula Mercantile Company's store at Missoula. In 1887 he was in the office of the Missoula Mercantile Company to get his pay and met Mr. A. B. Hammond, who asked him in regard to the number of logs that had been sent down in the drive.

M. J. Haley was special agent of the General Land Office during the years 1886 and 1887. He made an examination of the Edgar tract of land and determined the amount of timber that had been removed therefrom. He had some conversation with Henry Hammond in regard to the Edgar cutting, and also testified (Tr. p. 167) that he had a conversation with A. B. Hammond about the general cutting up and down the Big Blackfoot River. He could not remember what Mr. Hammond told him,

but knew that he asserted they were cutting within legal bounds. He further testified:

"Q. That is, he, and the other Hammonds, they were cutting on the Blackfoot and they were living within the law.

A. That the company, I don't remember the exact statement, but it was to that effect, that they were. (Witness continuing): I think we had a talk about it two or three times, perhaps oftener than that.

Q. Did Mr. Hammond, or did he not, assume to be in control or have anything to do with that cutting that was then going on on the Blackfoot River?

A. He let me know that he was the head of the whole thing.

Q. What did Mr. Hammond say to you?

A. I don't remember what he said, but the impression he gave me was that he was the—that it belonged to the company."

The testimony of this witness is amply sufficient to show that the defendant was thoroughly conversant with the operations here complained of, and approved the same.

Charles T. McCullach testified (Tr. pp. 171-2) that while he was employed at the Helena yard, A. B. Hammond came there and looked over the business in a general way. He had access to the books

of the company at that time. The final arrangements resulting in his employment as manager of the D. H. Ross & Company yard were made by A. B. Hammond personally. While he was employed at Helena, his instructions were to use everything he could from the Bonner mill and only buy from outside mills when the specifications called for material that he could not get at Bonner. While he was employed at Helena, the officers of the company told him that a man named A. B. Hammond owned the mill. Mr. Hammond was not an officer of the corporation, but was recognized as the general financier of the company. He came to both places where the witness was employed and examined the books. The only thing that he could remember concerning which Mr. Hammond gave him specific instructions while he was employed by the Helena Lumber Company was with respect to certain stock subscriptions to the corporation. When the witness was employed by the Big Blackfoot Milling Company, Mr. A. B. Hammond made the final arrangements for his employment and the salary he was to receive.

Thomas G. Hathaway testified (Tr. pp. 199-201) that Fred A. Hammond, while running the Bonita mill, had a contract with the Montana Improvement Company and the latter handled the lumber. Mr. A. B. Hammond was a stockholder of the Montana Improvement Company. In 1885 or 1886, the officers of the Montana Improvement Company heard of threatened suits by the Government and commenced to close out its lumber business. In regard to the

affairs of the Montana Improvement Company, Mr. Hathaway testified that he looked to A. B. Hammond for his orders, that Mr. Hammond was his manager and the witness an assistant. On page 204 he testified that he thought it was the Blackfoot Milling and Manufacturing Company that handled the biggest part of the output of the Bonita mill after Fenwick commenced to operate it. Some criticism has been offered to the testimony of this witness on account of his lack of clearness, but we submit that, when taken as a whole, it shows conclusively that the affairs of the Montana Improvement Company, Missoula Mercantile Company, Blackfoot Milling and Manufacturing Company and Big Blackfoot Milling Company were so closely associated as to make them practically one concern, and that defendant, A. B. Hammond, was the dominant figure in the business affairs of all of them. On page 216 of the transcript, he testified that A. B. Hammond was the general manager of the Missoula Mercantile Company in 1886 and 1887. He said, "A. B. Hammond, then, I suppose was the manager really, the head man of the Missoula Mercantile Company's management." There can be no doubt that the Bonita mill was erected by the Montana Improvement Company in 1885 (Tr. p. 224). The testimony of this witness (Tr. pp. 225-6) shows clearly that Mr. Hammond was thoroughly conversant with all the transactions complained of in this suit. With respect to the sale of the Bonita mill by Fred Hammond to George W. Fenwick, we invite the Court's attention to the

testimony of this witness on pages 236-241 and insist that this testimony alone is sufficient to show that the defendant participated in the conversion complained of by instigating, aiding and assisting those who actually cut and removed the timber.

Thomas Welch testified (Tr. pp. 243-4) that he was employed by Mr. A. B. Hammond in 1886 to work at the Bonita mill.

Gust Moser (Tr. pp. 250-2) was secretary and credit man of the Missoula Mercantile Company, secretary of the Blackfoot Milling and Manufacturing Company, and the secretary of the Big Blackfoot milling Company. He testified that A. B. Hammond was in the immediate charge of the business affairs of the Missoula Mercantile Company during the time the timber was cut and removed, and that the defendant was president of the Blackfoot Milling and Manufacturing Company. He had heard conversations between Henry Hammond and the defendant about the price of lumber and the price that they should pay for the cutting of logs, and things of that sort. These matters were discussed every time that Henry Hammond came into the Missoula Mercantile Company's office.

John Cunningham (Tr. pp. 266-7) was employed by Mr. Hathaway in Minneapolis. Mr. Hathaway had been sent to Minneapolis by Mr. Hammond and others to employ help in logging. When the witness arrived in Missoula he went to A. B. Hammond,

who told him to go up the Blackfoot River and report to George Hammond at the headquarters camp at Fish Creek. During the time that he was employed by W. H. Hammond in logging on the Big Blackfoot River, he was paid by checks which were cashed at the Missoula Mercantile Company's store. When the witness was first employed by Mr. Hathaway, Mr. Keith directed him to report to A. B. Hammond. He and others went into the store and told Mr. Keith what they came for and he told them to go and see A. B. Hammond. Mr. Hammond gave them a team and sent them up the river (Tr. p. 275).

C. H. McLeod (Tr. p. 289). The arrangements between Fenwick and the Missoula Mercantile Company, by which the account of the former with the latter was established, was made with the board of directors of which Mr. A. B. Hammond was a member. A. B. Hammond was a director and stockholder of the Big Blackfoot Milling Company. This witness also testified with respect to the assessment of the property of the Missoula Mercantile Company and stated that, as a general rule, the assessment list was finally approved by the board of directors before it was handed to the county assessor. This testimony is important because it shows that the assessment of the Bonner mill to the Missoula Mercantile Company was made with the approval of the board of directors of that corporation.

The extent of the defendant's ownership of stock in the Missoula Mercantile Company is shown by

the statement on pages 295-6 of the transcript. The minute book of the Missoula Mercantile Company shows (Tr. pp. 297-371) that the defendant A. B. Hammond was at all times a stockholder and director of the corporation. Most of the time he was the president and general manager, the remaining portion of the time he was vice-president. The record further shows (Tr. pp. 371-3) that he was one of the incorporators of the Big Blackfoot Milling Company.

Plaintiff's exhibit No. 5 (Tr. pp. 404-5), exhibit No. 6 (Tr. pp. 405-6), exhibit No. 7 (Tr. p. 406), exhibit No. 8 (Tr. pp. 406-7), which were certified copies of duplicate assessment books of Missoula County, Montana, for the years 1891, 1892, 1893 and 1894, disclose that the land upon which the Bonner mill was situated was assessed to the Missoula Mercantile Company. Exhibit No. 9 (Tr. pp. 407-8) discloses that the Missoula Mercantile Company was assessed for the year 1890 with the value of 6,750,000 feet of lumber and 4,000,000 feet of logs. Plaintiff's exhibit No. 10 (Tr. p. 408) discloses that the Bonner mill property was assessed to the Missoula Mercantile Company for the year 1890. Exhibit No. 11 (Tr. pp. 408-9) discloses that the Bonner mill property was assessed to the Missoula Mercantile Company for the year 1895.

The testimony of John M. Keith (Tr. pp. 418-429) is very important because it discloses the relations of the defendant A. B. Hammond to the transactions

complained of, and specifically details the assistance that was given by the Missoula Mercantile Company to Mr. Fenwick and W. H. Hammond in their timber business, and we invite the Court to read carefully the testimony of this witness. With respect to the sale of the Bonita mill by Fred A. Hammond to George W. Fenwick, this witness stated that Fenwick paid Hammond with notes, that the Missoula Mercantile Company took over these notes and handled them, that the notes given by Fenwick in purchase of the mill were taken over by the Missoula Mercantile Company in settlement of Fred Hammond's account with the company. It would thus appear that Fred A. Hammond was indebted to the Missoula Mercantile Company for the purchase price of the Bonita mill, and that when the sale was made from Hammond to Fenwick the notes of Fred A. Hammond held by the Missoula Mercantile Company were paid by the notes of Fenwick given to Fred A. Hammond, and the participation of the mercantile company in this transaction made it possible for both Hammond and Fenwick to conduct the mill at Bonita and thereby convert the timber cut from the public lands.

The testimony of the plaintiff, as well as the testimony of the defendant, clearly and conclusively show that the timber in question was cut and removed with the aid and assistance of this defendant, and we submit that the evidence is amply sufficient to support the verdict of the jury. It cannot be doubted, to give the defendant the most favorable

consideration, that there was some competent evidence to show that he was liable and that it was the duty of the Court to submit the question to the jury for its determination. The jury determined this question in favor of the plaintiff, and it is not for this Court to say that their conclusion was not correct merely because this Court may view the evidence from a different standpoint than it was viewed by the jury.

II. THE ACTS OF MARCH 3, 1891. (Act of March 3, 1891, Chap. 561, 26 Stat. L. 1095; and Act of March 3, 1891, Chap. 559, 26 Stat. L. 1093).

A. Neither Act of March 3, 1891, affects defendant's liability for the timber cut from the lands along the Hellgate River.

Counsel for defendant attempt to demonstrate the error of the Trial Court in refusing to give a peremptory instruction to the effect that the Government was not entitled to recover for any timber cut prior to the taking effect of the Act of March 3, 1891. In the beginning, it would be well to note that the lands embraced within the trespass here complained of are divided into two classes, namely, those which were mineral and those which were non-mineral. The defendant pleaded in his answer that the timber which was taken from the lands in the Hellgate country was taken under the permission granted by the Act of June 3, 1878 (1 Supp. to U. S. Rev. Stat. 1874-1881, p. 327), and some evidence was of-

fered to show that the lands situated in the Hellgate country were mineral lands within the meaning of the Act, and that Mr. Fenwick had complied with its provisions and the rules established thereunder by the Secretary of the Interior. No such contention was pleaded or attempted to be proven with respect to the lands situated in the Blackfoot River country. In so far as the lands situated in the Hellgate country are concerned, it is immaterial which of the Acts passed March 3, 1891, is now in effect, because Section 8 of both Acts indicates clearly that it was the intention of Congress that Section 8 should apply only to timber lands and should not apply to mineral lands as defined by the Act of 1878. In both Acts the following language is used: "It shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands," etc. In the amending Act of March 3, 1891, it is specifically provided "but this Act shall not operate to repeal the Act of June 3, 1878, providing for the cutting of timber on mineral lands." Having used the two terms "timber lands" and "mineral lands" in the amendatory Act which was passed on the same day as the original Act, it cannot be said that Congress employed the term "timber lands" in the original Act in the sense that it should include mineral lands on which timber was growing. It is undoubtedly true that where the words "timber lands" are used in the first Act passed on the 3rd of March, 1891, they were used in the same sense and with the same distinction that was intended in the amendatory Act of that date. It there-

fore follows that by no construction can it be said that Congress intended that the Act, which we here designate as the first Act, was in any manner to repeal or amend the Act of June 3, 1878 relating to cutting on mineral lands. The defendant having pleaded the Act of June 3, 1878, and attempted to show that the lands along the Hellgate River fell within the classification there contemplated, cannot now say that either Act of March 3, 1891, is a bar to the recovery by the Government for the timber cut and removed from those lands. He is bound by his allegations, and his plea for the benefit of the statute of 1878 made upon the trial debars him from now claiming that the lands along the Hellgate River were non-mineral in character and that he is entitled to the benefit of the first Act of March 3, 1891.

B. **Which Act is in effect?**

By a very adroit argument, counsel attempt to demonstrate that Section 8 of the first Act is the one now in effect. They say that a careful reading of the Congressional Record has failed to disclose which Act was first signed by the President, and that it would at least seem morally certain that the original Act had not been approved by the President at the time when the amending Act went through the House and Senate. This statement is without weight because it is notoriously true that the Congressional Record does not disclose the time of signing of a bill by the President; and their sec-

ond conclusion presupposes that Congress was ignorant of the laws it had already passed and which were then in effect, a presumption which a Court will never indulge in in determining the validity or existence of a law.

A very novel contention is made (brief for plaintiff in error, pp. 130-131) to the effect that if the first Act of March 3, 1891, was not signed and had not become law upon the passage of the amendatory Act, the latter would be void because there was no law in existence upon which it could operate. This is the first time that we have heard such an argument advanced in statutory construction. An examination of the amendatory Act shows that it is complete and all-sufficient within itself. It does not attempt to amend the first Act by simply striking out or inserting specific words or sentences which, if it had been done, might lend some support to the argument advanced, but it re-enacts as an entirety that which was contained in the first Act of March 3, 1891, together with the portions of the section which were added to the first Act, so that, as finally passed, the amendatory Act was full, definite and complete. If we may speculate upon the intention of Congress, it may be concluded with confidence that the error contained in the first Act was perceived immediately upon its passage, and by the passage of the amendatory Act Congress intended that the evil of the first Act should be remedied and that its benefits should be retained. Undoubtedly Congress, in its wisdom, saw immediately that the first Act would in effect

relieve such persons as this defendant of the consequences of their depredations upon the public domain, and without delay corrected the error by the passage of the amendatory Act.

The opening paragraph of the amendatory Act recites: "'An Act to repeal timber culture laws, and for other purposes,' approved March 3, 1891," etc., which clearly indicates that Congress recognized that the first Act had already been passed and had become effective prior to the passage of the amendatory Act. This same view of the situation was taken by the Supreme Court of the United States in *Northern Pacific R. Co.* vs. *Lewis,* 162 U. S. 366; 40 L. Ed. 1002-1007, where the Court said:

> "Nor did the plaintiffs obtain any rights under Section 8 of the laws of Congress approved March 3, 1891, entitled 'An Act to repeal timber culture laws, and for other purposes,' 26 Stat. at L. 1099. That section was amended by the Act approved on the same day, March 3, 1891, 26 Stat. at L. 1093."

Further support of our contention that the amendatory Act is now in effect is found in the fact that immediately after its passage and the promulgation of regulations by the Secretary, the Blackfoot Milling and Manufacturing Company applied for the permit involved in this suit, which was granted by the Secretary of the Interior, and the specific lands therein described and the regulations set forth, all in accordance with the amendatory Act.

Even if the first Act of March 3, 1891, was in

effect for any period of time whatever, it does not bar this action by the Government. The first Act, if in existence, only gave to persons situated like the defendant the right to interpose a specific plea in bar of the action commenced. It did not in specific terms wipe out and condone the offense committed. It therefore follows that if the first Act was in existence for any time during such period, the defendant only had the right to interpose such a plea, and after the amendatory Act was passed, this right to interpose such plea was taken away and defendant was possessed of only such rights as the amendatory Act gave him. The amendatory Act provides that it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such state or territory by a resident thereof for agricultural, mining, manufacturing or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior, and had not been transported out of the state or territory. The record in this case is absolutely silent as to any compliance with any rules or regulations in the cutting and removing of any of the timber in the Blackfoot country except the timber which was cut from the north half of the southwest quarter of Sections 18, 14, 15, under the permit granted the Big Blackfoot Milling Company as successor in interest of the Blackfoot Milling and Manufacturing Company. It is true that there was considerable testimony offered with respect to compliance with rules and regulations promulgated by the Secretary in the cutting of the timber from the

Hellgate lands. In respect to the cutting from the Blackfoot River lands, there was no evidence whatever to show that the defendant or any of the persons or corporations associated with him in the trespass, complied with any rule or regulation whatever. It has been repeatedly held by the Courts that the right to cut timber from the public domain is exceptional, quite narrow and for specified purposes only, that the presumption in the absence of evidence is that the cutting is illegal, and in order for a person to bring himself within the right, he must show strict compliance with the statute. (*U. S.* vs. *Cooke,* 86 U. S. 19 Wall. 591; 22 L. Ed. 210; *Northern Pacific R. Co.* vs. *Lewis,* 162 U. S. 366; 40 L. Ed. 1002-1006).

III. THE MEASURE OF DAMAGES.

A. The Court's Instructions.

1. The instruction setting forth the measure of damages applicable as for a wilful conversion.

In instructing the jury with respect to the amount of their verdict in the event they found the defendant was liable as a wilful trespasser, the Court said:

> "If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale."

2. **The instruction setting forth the measure of damages applicable as for an innocent conversion.**

With respect to this phase of the case, the Court instructed the jury as follows:

> "If you find that the defendant, or any of the said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market."

B. **The defendant's exception to the instructions.**

The record does not disclose that the defendant made more than one exception to the instructions given by the Court. The Court gave two instructions—one which set forth the measure of damages in the event the jury determined that the conversion was wilful, and the other in the event that the jury determined that the conversion was innocent. It is to be noted that the objectionable portion of the instruction given upon the hypothesis that the conversion was innocent contains two elements, if it is objectionable at all. The first part of the instruc-

tion follows exactly the language of the Supreme Court in the case of *Bolles Woodenware Co.* vs. *United States,* 106 U. S. 432; 27 L. Ed. 230. And the only objectionable feature that can be possibly imputed to this instruction is the latter portion of it where the Trial Court added the following: "In other words, if you find that timber was so cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market."

If the contention made by the defendant be correct, then the part of the instruction which was added by the Trial Court contains an entirely different element from that portion of the instruction quoted from the Woodenware case. If it does not, as we contend, and as the Court below thought, then the instruction as a whole is entirely in accord with the rule laid down in the Woodenware case. It is only upon the theory that this instruction contains conflicting elements or statements of the rule that the defendant can predicate any error. The rule in the Woodenware case has been repeatedly upheld and cited by the Courts as being the true rule in cases of conversion. The objection interposed by the defendant to the instructions given by the Court on the measure of damages is as follows (Tr. p. 780):

> "Mr. Wheeler. Next, as to the measure of damages. We except as to the measure suggested by the Court. We claim that the only measure that can exist under the circumstances is the value of the stumpage in the tree, and I think your Honor's instructions add to it another element."

The exception as thus made lacks certainty and direction in many respects. The language used shows clearly that counsel had in mind at that time both the instructions with respect to the measure of damages for a wilful conversion and for an innocent conversion, for he uses the term in the plural, i. e., "instructions." He does not point out to the Court specifically whether he means that he excepted to the instruction given on the hypothesis that the conversion was wilful or the one relating to an innocent conversion. The only portion of the exception which might avail counsel in their present contention is where they said that "the only measure that can exist under the circumstances is the value of the stumpage in the tree." The instruction given by the Court with respect to a wilful conversion told the jury that if they should find the conversion was wilful, they should return a verdict for the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale. This instruction clearly indicated to the jury that they should return, in the event they believed the conversion wilful, a verdict that embraced more than the value of the stumpage. The instruction with respect to an innocent conversion,

if considered as being in accord with the Woodenware case, is only another method of arriving at the stumpage value of the timber converted. In order that counsels' argument may have any force, they must assume that the latter portion of this instruction gave the profit derived from the conversion of the timber to the Government instead of to the defendant, and certainly they do not specifically point out by this exception which portion of the instruction was objectionable to them.

Counsel did not request the Court to give any instruction whatever as to the measure of damages. It is well settled in cases of trover and conversion that the burden is upon the defendant to show all facts which he claims will mitigate the damages. It is customary in such cases for the plaintiff to ask judgment for the highest market price of the property in whatever condition it may have been at the time of its disposal or sale by the defendant, and in order to reduce this highest measure of damages, the burden is upon the defendant to show those circumstances which will mitigate his offense. (*United States* vs. *Murphy,* 32 Fed. 378; *Trustees of Dartmouth College* vs. *International Paper Co.,* 132 Fed. 92; *United States* vs. *Gentry,* 119 Fed. 70; *Northern Pacific Co.* vs. *Lewis,* 162 U. S. 365; *United States* vs. *Cook,* 19 Wall. 591; *United States* vs. *Eccles,* 111 Fed. 490).

In the case at bar, although this burden was upon them and although their whole case was tried upon

the theory that defendant was entitled to the benefit of mitigating circumstances, counsel refused to ask any instructions of the Court upon either phase of the measure of damages. The Courts have universally held that such a practice by counsel is to be condemned, and they cannot avail themselves of such exceptions after they have declined to aid the Court in rightfully instructing the jury. It therefore follows that this exception was indefinite, uncertain and vague in that it did not tell the Trial Court whether it excepted to the instruction on the measure of damages in case the conversion was wilful, whether or not it referred to the first portion of the instruction relating to an innocent conversion, or whether it referred to the portion of the instruction which they now say gave to the Government whatever profit may have been derived from the conversion, manufacturing and sale of the timber in question.

On page 209 of part 2 of the defendant's brief, counsel say: "Before examining the decisions on this subject we would suggest to the Court, as we have already noted, there was nothing in the complaint or on the trial to indicate that there would be any attempt to depart from the well settled rule as to the measure of damages for the innocent conversion of standing timber. We had supposed the rule so well settled that we did not request any instruction in the premises. The instruction came as a surprise to us, and under the circumstances we submit we did all that could be reasonably expected.

On the other hand, the Court had the instructions requested by our side before it for many days and presumably had given mature consideration to that which it finally gave on this subject."

This statement by counsel is wholly unsupported by the record. The complaint (Tr. p. 4) very clearly indicates that the pleader had in mind such an instruction, for the value of the property, as it existed in its several conditions, is expressly set forth. It is stated that while standing in the tree, it was worth $1 per thousand; after being felled and prepared for sawing into lumber, $5 per thousand; and after being manufactured into lumber, $10 per thousand. This clearly indicates an intention to arrive at the value by the method indicated by the Court's instruction. The burden was upon the defendant, as we have already shown, to plead and prove the circumstances which would mitigate the damages, and it was certainly the duty of counsel to present to the Court an instruction with respect to the measure of damages in the event the jury believed their plea of good faith and lack of intention to convert the timber in question. Their failure to do so is so manifestly unjust and unfair to the Trial Court that we believe the cases referred to in the opinion of the Trial Court on the motion for a new trial, and those hereinafter cited, make it incumbent upon this Court to refuse to consider the exception taken to these instructions even though such instructions be manifestly erroneous.

Attention is further invited to the fact that the

exception taken by counsel is insufficient in view of the instructions given, because the instructions on the measure of damages with respect to wilful conversion included more than the stumpage value of the timber. It is not unreasonable to say that this language shows that counsel believed that the evidence was sufficient for the Court to declare peremptorily that the Government had failed to make out a case of wilful conversion, and that all that it could recover was as for an innocent conversion.

Counsel for the defendant wholly misconceive the rule which has been laid down with respect to the certainty of exceptions. In the opinion rendered by Judge Van Fleet on the motion for a new trial, he cites the following cases: *McDermott* vs. *Severe,* 202 U. S. 600-610; *Mobile Etc. Co.* vs. *Jurey,* 111 U. S. 584-596; *Montana Mining Co.* vs. *St. Louis M. & M. Co.,* 147 Fed. 897-909; *Butte Etc. Mining Co.* vs. *Montana Etc. Mining Co.,* 121 Fed. 524-528; *Springer Etc. Co.* vs. *Falk,* 59 Fed. 707; *Stewart* vs. *Morris,* 96 Fed. 703; *Porter* vs. *Buckley,* 147 Fed. 140; *Coney Island Co.* vs. *Denman,* 149 Fed. 687; *Central Etc. R. R. Co.* vs. *Mansfield,* 169 Fed. 614; *Beisecker* vs. *Moore,* 174 Fed. 368.

In all of these cases, and those hereinafter quoted from, the instructions of the Court to which exceptions had been taken contained more than one element or rule of damages, and the Appellate Courts held that a general exception to a charge containing more than one element was not sufficient to advise

the Trial Court of the specific element of the charge which was deemed objectionable. Counsel do not seem to be able to make this distinction in their argument, for all of the cases cited by them in support of their position are cases where the charge to the jury referred to but one element of damages. In the case at bar we have already pointed out that the charge given by the Court referred to the measure of damages applicable in the event the jury found the defendant was liable as for a wilful conversion, and that according to counsels' own argument, the instruction with respect to an innocent conversion contained two different and conflicting elements, one concededly correct under the doctrine of the Woodenware case, and the other now objectionable to counsel for the defendant. We thus have in the case at bar instructions on the measure of damages containing three separate and distinct elements and no definite or certain declaration by counsel as to which of these elements was erroneous. We earnestly insist that this conduct on the part of counsel was unfair to the Court and their concealment of their objection in this manner should not avail them in this Court. We submit that the decision of the Trial Court on this point is in full accord with the rule adopted by all Appellate Courts.

In *McDermott* vs. *Severe,* 202 U. S. 600-610, discussing an exception to the charge of the Court on the question of damages *where as here the charge involved several distinct elements,* it is said:

"The Court's attention was not called to any

particular in which this charge, which covers a number of elements of damages, was alleged to be wrong; only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases, that an exception of this general character will not cover specific objections which, in fairness to the Court, ought to have been called to its attention, in order that, if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specially the part of the instruction regarded as erroneous. *Baltimore & P. R. Co.* vs. *Mackey,* 157 U. S. 72-86; 39 L. Ed. 624-629; 15 Sup. Ct. Rep. 491. * * * It would be very unfair to the Trial Court to keep such an objection in abeyance, and urge it for the first time in an appellate tribunal."

And again in *Mobile Etc. Co.* vs. *Jurey,* 111 U. S. 584-596, *where the charge embraced two several elements,* and the exception failed to specify as to which it was intended to apply, it is said:

"Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions: First, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be 8 per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was, therefore, ineffectual. It should have been

pointed out to the Court the precise part of the charge that was objected to. 'The rule is, that the matter of exception should be so brought to the attention of the Court before the retirement of the jury to make up their verdict, as to enable the judge to correct any error, if there be any, in his instructions to them.' *Jacobson* vs. *State,* 55 Ala. 151.

'When an exception is reserved to a charge which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the Court to the precise point of objection.' *R. R. Co.* vs. *Jones,* 56 Ala. 507.

"So in *Lincoln* vs. *Claflin,* 7 Wall. 132, this Court said: 'It is possible the Court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. * * * But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. * * * It embraces several distinct propositions, and a general exception cannot avail the party if any one of them is correct.' On these authorities we are of the opinion that the ground of error under consideration was not well saved by the bill of exceptions."

In the case of the *United States* vs. *The U. S. Fidelity & Guaranty Company, et al.* (236 U. S. 512), the Court said:

"The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be

obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court. *Beaver* vs. *Taylor,* 93 U. S. 46-55; *Robinson & Co.* vs. *Belt,* 187 U. S. 41-50; *Addis* vs. *Rushmore,* 74 N. J. L. 649-651; *Holt* vs. *United Security Life Ins. Co.,* 76 N. J. L. 585-593. And the practice respecting exceptions in the Federal courts is unaffected by the Conformity Act, Sec. 914, Rev. Stat. Chateaugay Iron Company, Petitioner, 128 U. S. 544-553; *St. Clair* vs. *United States,* 154 U. S. 134-153."

In the recent case of *Illinois Central R. R. Co.* vs. *Skaggs* (194—Oct. Term, 1915. Decided, Jan. 31, 1916), the Court said:

"If the plaintiff in error desired any addition, amplification or qualification in order to present its point of view to the jury, it should have made appropriate request therefor. The record does not show that the plaintiff in error either objected at the time to any statement made by the Court to the jury or that it made any request whatever for instructions. While under the local statute (General Statutes, Minnesota, Sec. 7830), the plaintiff in error was permitted (without taking exceptions at the trial) to specify upon a motion for a new trial alleged errors in the rulings or instructions of the Trial Court, *we do not find that this statute alters the salutary rule that a party is not entitled to sit silent until after the verdict and then insist that it shall be set aside because of a failure on the part of the Trial Court particularly to specify in its charge some matter to which its attention had not been suitably called. State* vs. *Zempel,* 103 Minn. 428-429; *Waligora* vs. *St. Paul Foundry Co.,* 107 Minn. 554-559; *Sassen* vs. *Haegle,* 125 Minn. 441; *State* vs.

Sailor, 153 N. W. Rep. (Minn.), 271; *Smith* vs. *Great Northern Rwy. Co.,* 153 N. W. Rep. (Minn.), 513. This, also, is a sufficient answer to the complaint of the failure of the Trial Court to charge the jury with respect to assumption of risk. There was no request for any instruction upon this point." (Italics supplied.)

In the case of *William Sebald Brewing Co.* vs. *Tompkins,* 221 Fed. 895, the Court, on pages 899-900, said:

"The third and fifth assignments challenge the charge of the Court, touching: (a) the question of the defendant's negligence; and (b) the plaintiff's contributory negligence. The record discloses the following: 'Mr. Strong: I desire also to except to your Honor's charge upon the question of negligence and contributory negligence.' We are inclined to the opinion that the exception on which these assignments are based is too general (rule 11 of this Court [193 Fed. vii, 112 C. C. A. vii]) to support the assignments."

Counsel for defendant tacitly concede that the Court correctly instructed the jury as to the measure of damages applicable for a wilful conversion. Their only objection goes to the instruction given as to the measure of damages for an innocent conversion. The Courts have uniformly held that a general exception to a charge to a jury is not available if any part of the charge is correct. We invite attention to the case of *Moore* vs. *Bank of the Metropolis,* 13 Pet. 302, 10 L. Ed. 172-173, and note.

C. **The instruction on the measure of damages in case the conversion was innocent was not erroneous.**

1. The rights of the United States are governed by the rules adopted by the Federal Courts.

It is difficult to determine the position taken by counsel for the defendant with respect to the question as to whether the rights of the United States with respect to this property that has been converted, will in any manner be governed by the laws of the several States. After carefully reading that portion of their brief on this question, we conclude that they make no serious contention that the Trial Court should have followed the rule adopted by the State of Montana. This question has not been clearly and definitely determined by the Courts. We believe the cases of the *United States* vs. *Bean,* 120 Fed. 719, and the *United States* vs. *Thompson,* 98 U. S. 488, sufficiently indicate a determination on the part of the Federal Courts to disregard State statutes which may affect the rights of the United States with respect to its property. In none of the cases decided and reported by the Federal Courts is there any indication of an intention on the part of the Courts to follow the measure of damages adopted by the several States, or to give them any weight where the rights of the United States are concerned. The whole trend of decisions on this point is to the effect that the Federal Courts will adopt their own rules in respect to such property and rights. It is well established that Congress is the only power which can deal with the property of the United

States and provide for its disposal, and that State statutes cannot affect the right of Congress in any respect. The Federal Courts have adopted rules of their own irrespective of the State laws, and apparently Congress has contented itself with this method of procedure. It would therefore seem to be a settled question that the rights of the Government in this case must be measured by the rules adopted by the Federal Courts. For a full discussion of the rights of Congress, and impliedly the rights of the Federal Courts, to deal with the property of the United States, we invite attention to the case of *Light* vs. *The United States,* 220 U. S. 523, and particularly the brief of counsel for the government, 55 L. Ed. 570-573.

2. The instruction was not erroneous.

It is indeed difficult to determine what rule of damages will apply in cases of innocent conversion. A careful consideration of all the cases, both in the Federal and State reports, shows that there is a lack of uniformity and that it has apparently been the intention of the Courts to frame a measure of damages applicable to each case. It is true that through all of the decisions certain fundamental principles seem to be carried, but each case and its peculiar facts have required that the instructions given to the jury should be based upon those facts rather than upon some established rule. In the language of Judge Lowell in the case of *Trustee of Dartmouth College* vs. *The International Paper Co.,*

supra: "some of these rules seem to have been adopted as rough and ready measures of convenience, some without recognition of the difference between them." These different rules undoubtedly arise from the fact that although a trespass may be innocent and committed in ignorance, yet there is a measure of negligence inherent in every conversion. This negligence varies with the facts in every case, and it is unreasonable to say that any hard and fast rule applicable to all degrees of negligence can be adopted by the Courts. Counsel for the defendant rely largely upon the case of the *United States* vs. *St. Anthony R. R. Co.,* 192 U. S. 524, where it is said: "We think the measure of damages should be the value of the timber after it was cut at the place where it was cut." This rule is wholly inconsistent with the rule adopted by the Court in *Woodenware Co.* vs. *The United States,* 106 U. S. 432, and likewise the language of the Court in *Pine River Logging Co.* vs. *The United States,* 186 U. S. 279, and other cases cited; but it is to be noted that the case at bar differs widely from these cases with respect to the facts and to the degree of negligence attributable to the defendant. The cases cited are each instances where one specific act of conversion was charged. In the case at bar, the testimony discloses that the conversion was a series of acts covering a wide period of time and under a diversity of circumstances. In the cases referred to, it is not apparent that the defendants were engaged in wholesale depredations upon the public domain and were

not engaged in cutting and removing timber from public lands as a business for profit, but were merely charged with conversion of specific and definite quantities of timber which apparently were taken for the personal use of the defendants. In this case, we have an entirely different situation. The defendant and his personal and corporate associates were dealing fast and loose with the timber on the public domain. They were not taking this timber for the purpose of improving some property of their own or applying it to their own specific needs, but were cutting and removing it for sale in their general course of business, and it is not harsh or unjust under the circumstances for a Court to say that this defendant, although he may be technically innocent, has exhibited such a degree of negligence and has shown such a disregard of the rights of the Government as not to render him entitled to any of the profits derived from the cutting and manufacturing and sale of the timber in question. We say this without conceding that the language of the Court's instruction may be interpreted to mean what counsel for the defendant say it means, but we advance this argument for the purpose of showing that the defendant is not strictly within the rule laid down by cases upon which counsel rely. It is to be noted also that in the cases of *United States* vs. *St. Anthony R. R. Co.* and *Pine River Logging Co.* vs. *The United States,* and the other cases cited and relied upon by counsel, the Courts did not have under consideration the element which

they have attempted to read into the Court's construction in this case. In these cases, the principal question that was determined was not that such an instruction as the one in this case was erroneous, but whether the defendant there charged was an innocent or a wilful trespasser; and we submit that the language of the Court in determining the wilfulness or innocence of the defendant is utterly irrelevant to the question as to what measure of damages is applicable as for an innocent conversion.

In cases of trover and conversion, the actions are not always brought upon the same theory. This is largely due to the fact that the subject of the action is personal property which may undergo changes. It is undoubtedly true that a plaintiff is entitled to the possession of the property at all times before the commencement of his action. He may, if he chooses, demand possession immediately after it is seized by the wrongdoer. He may not have knowledge of the conversion at that time and may make his demand for the property after it has been improved and changed. The Courts have uniformly held that the plaintiff may charge the conversion as at any date prior to the bringing of the action, and in attempting to fix the measure of damages, the Courts will take into consideration the status of the property at the time of the commencement of the action (see *Trustees of Dartmouth College* vs. *The International Paper Co., supra*); and we do not believe that the cases cited by the plaintiff in error indicate any intention on the part of the

Supreme Court to lay down the rule that in all cases, the value at the time of first taking must govern. Clearly the Supreme Court had no such intention in the Woodenware case, and in the subsequent cases there is no expressed intention to overrule that case. We insist that the language of the Woodenware case fully contemplates such a situation and that the Court had in mind, when rendering its decision, that cases such as the one at bar might arise in the future. The instruction given by the Court follows closely the language of the Woodenware case, and without some manifest intention of the Supreme Court to overrule this language, we do not believe under all the circumstances in this case that this Court should say that the Trial Court made an error in this instruction. It is very clear that the first part of the instrucion given was proper, and it is only by interpretation of counsel that the instruction can be said to depart from the doctrine laid down in the Woodenware case.

However, counsel dwell at length upon the second part of this instruction and insist that it is erroneous and without support by any decision of the State or Federal Courts. The language used in this part of the instruction finds support in the case of *Winchester* vs. *Craig,* 33 Mich. 205, which is relied upon and cited by the Supreme Court in the Woodenware case. Counsel for the defendant say that the case of *Winchester* vs. *Craig, supra,* was overruled on June 10th, 1885, by the Supreme Court of Michigan in *Ayers* vs. *Hubbard,* 23 N. W. 829; but in this

latter case, the Court did not have before it the same instruction that was before the Court in *Winchester* vs. *Craig*. It would seem that the question determined in *Ayres* vs. *Hubbard* was not as to the measure of damages applicable to an innocent conversion, but was a question as to whether or not the defendant was a wilful or an innocent trespasser. This case is merely another instance of the fact we have already adverted to that the Courts, in cases of conversion, have not followed any fixed measure of damages, but have apparently applied such rule as they thought the facts in each case warranted. It is to be noted that in all of the cases cited by counsel for the defendant, the particular language upon which they rely for support is applicable to the facts then before the Court, and in none of them was the situation the same as in the case at bar. In none of them did the plaintiff seek to measure the liability of the defendant by deducting from the market value of the manufactured product the actual expense of improvement. Because these cases were cast upon a different theory, it is not conclusive that the language of the Courts is in effect a declaration that the principle involved in the instruction under consideration is erroneous.

In the case of *Vance* vs. *W. A. Vandercook Co.* [No. 2] 170 U. S. 468, 42 L. Ed. 1111, Mr. Justice White, now Chief Justice, reviews at length the question of the measure of damages for the conversion of property, and we submit that this case on the whole supports the contention made by the Government in

the case at bar, that the measure of damages recoverable is not always limited to the value of the property in the condition it was at the time of the taking. The authorities there reviewed show that the damages allowable may be based upon the value of the property at a date subsequent to its conversion.

In the case of *Tome* vs. *Dubois,* 6 Wall. 548, 18 L. Ed. 943, the Supreme Court of the United States approved an instruction which permitted the plaintiff to recover the manufactured value of certain timber less the cost of saving the logs and sawing them into lumber.

In the case of *Trustees of Dartmouth College* vs. *The International Paper Co.,* 132 Fed. 92, the Court said:

> "Unfortunately, the precise measure of the allowance to the defendant for his improvements has been stated by different Courts—or by the same Court—in many ways. *In theory, the allowance should equal the cost of the defendant's improvements,* not to exceed the consequent enhancement of value in the property converted." (Italics supplied.)

In the case of *Herdic* vs. *Young,* 55 Pa. St. 176, 93 Amer. Dec. 739, the Court on pages 742-743, after determining that the rule of damages is the same in trespass and conversions as in replevin, said:

> "If he claim the additional value, it is always his right to retain the property by giving a property bond; and the effect of a verdict for

damages in favor of the plaintiff is to transfer the title to the defendant. If, therefore, he denies that his trespass was wilful or wanton, and claims a right to the additional value given to the chattel by his labor and money in converting and transporting it to the place where it is replevied, he has it in his power to bring the damages of the plaintiff to their true standard. In a case of inadvertent trespass, or one done under a *bona fide* but mistaken belief of right, this would generally be the value of the logs at the boom (the place here of replevy), less the cost of cutting, hauling and driving to the boom. Such a standard of damages, growing out of the nature of the act and of the form of action, is reasonable, and does justice to both parties. *It saves to the otherwise innocent defendant his labor and money, and gives to the owner the enhancement of the value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities, or other adventitious causes.* These principles are recognized fully by Mr. Sedgwick in his valuable treatise on damages, ed. 1852: 'That the intent of the defendant is material in regard to damages, has always been recognized in our law': p. 455. 'The question of intention is urged only in mitigation or aggravation of damages': Id. 455, 528. On page 495, he says: 'If the property had been altered and increased in value, the rule would again depend on the character of the conversion. If that were wilful, then the value of the articles so increased would be the rule. But this should never be where the act was *bona fide;* and in such case, the true rule would be to allow the defendant for whatever value his labor had actually conferred upon the property': see also Id. 501. The Court below erred, therefore, in rejecting the plaintiffs' evidence of the

> value of the logs in the boom; the evidence being received, the defendants would be left to rebut it, if their trespass was unintentional, by showing how much it cost to cut and haul the logs and drive them to the boom." (Italics supplied.)

This case is also interesting because it declares, as we have hereinbefore attempted to indicate to this Court, that in fixing the measure of damages, even in cases of innocent conversion, the Court will be largely influenced by the specific facts in the case under consideration.

On page 190, part 2, of their brief, counsel for defendant say: "With the overruled *dictum* of an early Michigan case as the only precedent to support the instruction given by the Trial Court, we naturally expect the proposition to be advanced that if the wrongdoer is credited with the cost of manufacture, he would not object to pay stumpage value plus the profits made, if any, in his wrongful enterprise." They thus say that we are supported by mere *dictum* in a case already overruled. This contention is refuted by the decision of the Supreme Court of the State of Michigan in *Anderson* vs. *Besser,* 91 N. W. 737, which was rendered September 30th, 1902, seventeen years after the decision in *Ayres* vs. *Hubbard, supra,* which counsel say overruled *Winchester* vs. *Craig.*

In *Anderson* vs. *Besser,* the Court said:

> "The next question relates to the measure of damages. Plaintiff now seeks to obtain the value of the timber at the railroad, without any deduction for cost of cutting and removing it

to the railroad. Upon the trial, he requested the Court to instruct the jury as follows: 'If you find that the defendant cut the timber thinking in good faith that he owned the timber through his tax titles, then the fair measure of damages would be the market value of the logs at the point where they were sold by the defendant, less the amount paid by Mr. Besser to put them on the track, with interest from the date they were placed on the railroad track until the present time. In determining the market value of the logs at the track, the amount for which the defendant sold the logs, of which the timber from the land in question formed a part, should be considered by you.' This request was given, with the modification that they should 'deduct what it was fairly worth, or what it would fairly cost, to put the logs upon the track.' In closing his instructions, the Court said: *'But, to sum it all up, you should give the plaintiff, if you find that the defendant, as I have instructed you, acted in good faith in this matter, under his tax titles, all that the timber was fairly worth on the stump, on the land in question, together with such profit as he might have made in removing it to the place where it was landed, and then sold at the fair market value for the logs at that place.'* Four actions were open to plaintiff: (1) Trespass *quare clausum fregit*; (2) replevin; (3) assumpsit, under Section 11,207, Comp. Laws; (4) trover. In an action of trespass, he would recover all damages to the freehold, including the value of the timber removed. In replevin, he would recover the property in its changed state, unless the defendant had obtained title by accession under the rule of *Wetherbee* vs. *Green,* 22 Mich. 311, 7 Am. Rep. 653. In an action of assumpsit, he would recover the value of the timber, but upon what basis such value should be determined seems never to have been

before the Court, and we refrain from expressing an opinion. By bringing an action of trover, these other remedies are waived, and the rule of damages in trover must apply. The general rule in trover is that the plaintiff is entitled to recover the value of the property converted. Difficulties in applying this rule have arisen where the defendant has added to the value of the property converted by his own labor and expense, and where he has obtained possession by fraud or wilful wrong, and where his acts were casual and involuntary. The decisions upon the measure of damages where trespasses have been committed, and timber, coal, and other materials have been severed from the realty and converted, are not harmonious, and cannot be reconciled. Where the trespass was not intentional, and the manufactured property is worth 27 times the standing timber, the unintentional trespasser obtains title by accession. *Wetherbee* vs. *Green, supra; Carpenter* vs. *Lingenfelter,* 32 L. R. A. 422, and note (s. c. 42 Neb. 728, 60 N. W. 1022). In applying this doctrine, the facts in each particular case must govern. See *Mining Co.* vs. *Hertin,* 37 Mich. 332, 26 Am. Rep. 520, where it was held that the property was not so increased in value in its changed states as to justify the application of the rule of title by accession. Plaintiff relies upon *Grant* vs. *Smith,* 26 Mich. 201. The reasoning of that case is not easily reconcilable with *Winchester* vs. *Craig, supra,* decided four years later. Three of the justices who decided *Grant* vs. *Smith* also participated in the decision in *Winchester* vs. *Craig,* and two of them approved the opinion. It was there held, in an exhaustive opinion, that, in the absence of fraud, violence, or wilful negligence or wrong, the proper measure of damages, as a general rule, in trover, is such sum as will afford compensation for the actual

injury sustained. The rule in *Grant* vs. *Smith* would apply in cases of wilful trespasses, and the opinion in *Winchester* vs. *Craig* in effect so holds, for it says that, with the tax deed rejected, there was nothing tending to show that defendant acted other than as a wilful trespasser. *Winchester* vs. *Craig has been frequently cited with approval by this and other Courts, and states the rule which is sustained by the clear weight of authority.* It is cited in *Bolles Woodenware Co.* vs. *U. S.,* 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, where the rule for assessing damages in such cases is held to be: (1) Where plaintiff is a wilful trespasser, the full value of the property at the time and place of demand or of suit brought, with no deduction for his labor and expense; (2) where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value; (3) where he is a purchaser, without notice of wrong, from a wilful trespasser, the value at the time of such purchase. See, also, *Ayres* vs. *Hubbard,* 57 Mich. 322, 23 N. W. 829, 58 Am. Rep. 361, Id. 71 Mich. 594, 40 N. W. 10; *Gates* vs. *Boom Co.,* 70 Mich. 311, 38 N. W. 245; *Bailey* vs. *Railroad Co.* (S. D.) 19 L. R. A. 653, and note (s. c. 54 N. W. 596); *Whiting* vs. *Adams,* 66 Vt. 679, 30 Atl. 32, 25 L. R. A. 598, 44 Am. St. Rep. 875." (Italics supplied.)

This case is likewise important in that it holds that "in applying this doctrine, the facts in each particular case must govern," and also that *Winchester* vs. *Craig* has been frequently cited with approval by the Courts of the State of Michigan and other Courts.

Attention is invited to the following cases which

announce the same doctrine as the common law rule, to wit:

Heard vs. *James,* 49 Miss. 236;
Baker vs. *Wheeler,* 8 Wendell 505;
Baldwin vs. *Porter,* 12 Conn. 484;
Brizsee et al. vs. *Maybee,* 21 Wendell 144.

On pages 178-179 of their brief, counsel for the defendant cite a recent decision of the Department of the Interior, Vol. 40, pages 518-525, with respect to the measure of damages in cases of innocent trespass. It is to be noted that the decision referred to is predicated upon an offer of compromise made by the trespasser in which he tenders to the Government the value of the timber after severed. It is likewise an instance where the trespasser was not engaged in continual depredations upon the public domain, but was clearly and honestly an unintentional trespasser. Counsel quote a portion of the decision which is found on page 525. In the paragraph just prior to the quotation, the Secretary considers the case of *Woodenware Co.* vs. *The United States, supra,* and the language employed clearly indicates that he was of the opinion that the Woodenware case decided that the deduction allowable to an innocent trespasser from the market value of the improved property, was merely the cost of the labor or improvement added to the property after it was finally severed from the soil and removed from the premises where cut. In sustaining the position taken, this decision refers to the case of *Wright* vs. *Skinner,* 34 Fla. 453, 16 So. 335, which

case also refers to the Woodenware case, and the quotation found on 524 of the Secretary's opinion indicates that the Supreme Court of Florida considered that the Woodenware case allowed only for the cost of any labor bestowed upon the property after the conversion was consummated by actual removal from the owner's land.

We therefore submit that the instruction given by the Court in this case was proper, and that the defendant is not entitled to urge his objection to it in this Court because of his failure to point out specifically the error he complains of.

IV. INTEREST.

A. The instructions given by the Court and the exception thereto.

The Court instructed the jury (Tr. p. 770) as follows:

> "In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time."

At the close of the Court's instructions, the following colloquy between the Court and counsel occurred (Tr. p. 776):

> "Have counsel any suggestions to make?
>
> Mr. Hall: I have no exceptions, but I merely suggest at this time that the rate of interest should be stated to the jury by the Court.
>
> The Court: The rate of interest is the legal rate of 7%."

In saving their exception to the Court's instruction, counsel said (Tr. p. 780):

> "I also except to your honor's instructions with regard to interest."

The principal objection now urged against this instruction is that the Government was not entitled to recover any interest whatever upon the value of the timber found by the jury to have been converted. It is the contention of the Government that the instruction is entirely proper, and it would seem from the authorities cited by counsel for defendant that they have come to the conclusion that the question of interest was wholly within the discretion of the jury. They seek now to excuse themselves for not properly informing the Court at the trial of the true rule with regard to interest by saying that the interest was not prayed for until the amendment was made to the complaint at the close of the evidence. The record discloses that between the time of the amendment and the instructions of the Court, some two or three days were consumed in argument, and this was certainly sufficient time for such eminent counsel as appear for the defendant to investigate and determine in their own minds the true rule as to interest. We do not doubt that if they had intended to be fair with the Court and to present their theories fully and completely in order that the Court might know their contentions, there was sufficient time for them to have presented to the Court either an instruction denying interest entirely or submitting the question to the jury. They did not see fit to tell the Court of their position nor did they attempt

to say anything upon the question as to what rate of interest the jury should allow. The exception they made did not indicate to the Court which phase of the instruction, or the so-called error, they were complaining about, and it is not now for them to say that they had in mind the fact that no interest at all should be allowed. In passing upon the motion for a new trial (*United States* vs. *Hammond,* 226 Fed. 849), the Court said:

> "It is obvious, I think, that this exception is insufficient within the principles of the cases above stated and particularly *Mobile, etc.* vs. *Jurey, supra,* the latter case being precisely opposite in the nature of the question involved. As in that case, the charge here embraces two distinct propositions on the subject to which it relates. First, the right of the plaintiff to interest, and, second, the rate by which it is to be estimated. The criticism now made is, not that plaintiff was entitled to interest in no event, but that its allowance should, under the circumstances, have been left to the discretionary judgment of the jury. But manifestly the language of the exception is not of a nature to convey any such significance to the mind of the Court, nor indicate whether the objection was aimed at the direction to award interest or to the specification of the rate at which the jury should compute it. Had the Court's attention been arrested to the objection now urged, it would have been a very easy matter to modify its language to avoid the criticism, had it been deemed correctly founded; but although the prayer of the bill was amended at the trial to include the demand for interest and plaintiff's requested instructions included one for its allowance, those of defendant were silent on the subject and the charge was framed upon the

assumption by the Court that its allowance was a matter of right. Moreover, the specification of the rate of interest, having been inadvertently omitted from the charge, was added by the Court at the suggestion of counsel for the Government before the jury retired, and neither then nor thereafter in taking his exceptions did defendant suggest any objection to the direction on the subject other than the general exception above noted. Under the circumstances, I think the assertion of the objection now made must be held as unavailing.

"In view of this conclusion, it would subserve no useful purpose to discuss definitely the question strongly mooted between counsel, whether the objection now urged, if properly raised, would be well taken. It may be suggested that while the question seems left in some doubt and difference in the Federal Courts whether interest in the absence of statutory sanction is allowable as a matter of right, the rule of the charge is the generally prevailing one (Sedgwick's Elements of Damages, p. 137, 2nd Ed.; 1 Sedgwick on Damages, 631; Joyce on Damages, Vol. 2, p. 1261, par. 1105; Sutherland on Damages, Vol. 2, p. 969, par. 355) and is that prescribed by statute in this and most of the other States. These suggestions are made merely to illustrate that the question in controversy is a close one, and the case, therefore, essentially one where the exception should have been such as to specifically direct the attention of the Court to the precise objection intended to be raised."

B. **Interest should be allowed on the value of property converted.**

1. The authorities cited by the defendant.

Counsel, in support of their argument that the

Court erred in its instructions in respect to interest, rely upon *United States* vs. *St. Anthony R. R. Co.,* 192 U. S. 543, 48 L. Ed. 548. They urge that this case is authority for their contention because the Court, in reversing the case and giving directions for the rendition of judgment by the Lower Court, did not specifically say that the judgment should include interest on the value of the property converted. An examination of the reported case fails to reveal that the question of interest was presented to or considered by the Court. Even in the brief of counsel appended to the reported case, there is nothing indicating that this question was under consideration, and, as we have pointed out before, the portion of the opinion quoted by counsel for the defendant on page 196 of their brief, was not in reality the question under discussion. While the second syllabus would seem to indicate that the Court was really considering the measure of damages, the body of the opinion shows that the real question was whether or not the St. Anthony R. R. Co., having acted upon the advice of counsel, was liable as a wilful or an innocent trespasser. There was but one other point discussed in the case, namely, that of adjacency, and this was in fact the principal contention between the parties and the principal point decided by the Court. The Supreme Court was not asked to pass upon the question of interest, and from the record it is apparent that the question was never considered by either side. We do not believe that the Court's silence on a question not raised is any authority in support of the argument here advanced.

Great weight is given to the case of *White* vs. *United States,* 202 Fed. 501, where the Court required the United States to enter a *remittitur* before it would affirm the judgment. An examination of this case shows that the allowance of interest by the jury was entirely without instruction from the Court and apparently upon the jury's own volition. The facts of the case show that the jury returned a verdict based upon the highest market value of the lumber converted between the time of conversion and the time of the trial. This highest market value was not as of the date of the conversion, but as of a date long subsequent thereto. The jury did not compute the interest from the date of the market price fixed and accepted by them, but gave interest from the date of conversion. Such action is wholly inconsistent because if the defendant was liable for the highest market price, which was greater than at the date of conversion, it would be unjust and inequitable to compel the defendant to pay interest for a period of time anterior to the date on which such market price actually existed.

The case of *Eddy* vs. *Lafayette,* 163 U. S. 456-467, 41 L. Ed. 225, is distinguishable from this case because that action was not an action for the conversion of personal property. It was a case where an individual sought to recover damages from the receivers of a railroad company for the destruction of personal property. There was nothing showing that the railroad company had benefited by its tort, while in the case of conversion of personal prop-

erty, interest is allowed upon the theory that the estate of the tort feasor has been enriched, and that between the time of conversion and the rendition of judgment, he has had the use and benefit of the property converted. In cases of negligent destruction of property, the tort feasor derives no benefit from his wrongful act, whereas in cases of conversion, like cases of unlawful detention of money, the wrongdoer is presumed not to have wrapt the talents in a napkin, but to have put them out at interest or otherwise employed them in his business affairs so that he has derived a benefit therefrom. Careful examination of the case of *Eddy* vs. *Lafayette, supra,* would seem to indicate that the Appellate Courts will not disturb the verdict of a jury even though an erroneous instruction was given with respect to interest, unless it clearly and conclusively appears that the jury did include interest. Counsel for defendant have attempted to demonstrate that the verdict in this case is largely made up of interest, but we shall treat that question separately and demonstrate the fallacy of their argument and the error of their conclusion.

The case of *Lincoln* vs. *Claflin,* 17 Wall. 132-139, 19 L. Ed. 106, is cited on the question of the allowance of interest, but before taking up that aspect of the case, we wish to advert to that part of it which should have been considered in discussing the liability of the defendant in this case. The Court said (p. 109 L. Ed.): "The declaration alleges that the fraud was a matter of pre-arrangement between

them, and their counsel insisted that proof of such pre-arrangement was essential to a recovery against Lincoln, but the Court held that it was sufficient to show that he subsequently, with knowledge of the fraud, became a party to it; that subsequent participation in the fraud and its fruits was as effective to charge him, as preconcert and combination for its execution. In this holding we perceive no error." And if we may be pardoned for further digression, we invite the Court's attention to the fact that all of these operations with respect to the timber in question undoubtedly tended to enhance the estate of the defendant, and he undoubtedly participated in them. The record shows (Tr. pp. 639-640, 686-687) that but a few short years before the depredations complained of commenced, this defendant purchased his interest in Eddy-Hammond & Co. for $7,000.00 or $8,000.00, $4,000.00 of which he paid in cash and the balance he was given credit for by his co-partners. The record further shows (Tr. pp. 295-296) that the defendant's holdings on August 20th, 1885, in the Missoula Mercantile Company, the successor of Eddy-Hammond & Co., were 832 shares of stock of a total capitalization of $300,000.00; and that in 1891, he owned 1020 shares of the first preferred stock of the corporation; and that in 1894, the capital stock of the corporation was $1,200,000.00 and that the defendant owned 2142 shares of second preferred and 2156 shares of common stock in the corporation. This evidence, when taken in conjunction with the whole evidence in the case to the effect that all of these transactions respecting the

cutting of the timber in question were conducted through the office of the Missoula Mercantile Co., impels the conclusion that the defendant not only participated in the conversion, but that his estate was enriched thereby. The language quoted in the brief is not entirely indicative of what the Court meant. The Court just previous to the portion quoted said: "It is possible that the Court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods," which language indicates that, under the specific facts involved in that case, the Court itself was not positive that the allowance of interest was erroneous. The language of the Court with reference to the allowance of interest for the unlawful detention of money correctly announces the rule with respect to the detention of money, and, as we shall hereinafter show, the allowance of interest on the value of property converted is based upon the same hypothesis. This case is further interesting because the Court said: "But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the appeal, contrary to the proper practice, as repeatedly stated in our decisions, and contrary to an expressed rule of this Court. *It embraces several distinct propositions, and a general exception in such case cannot avail the party if any one of them is correct.*"

We ask that the quotation just given be con-

sidered in conjunction with our argument heretofore made that the exceptions made by the defendant upon the trial cannot now avail them with respect to the alleged error by the Court in giving instructions on the measure of damages and as to interest.

Neither is the case of *District of Columbia* vs. *Robinson,* 180 U. S. 92-107, 45 L. Ed. 440, in point because that was not an action in trover for the conversion of personal property, but was one for damages for alleged trespasses on lands of the defendant. The trespasses consisted in breaking and entering the defendant's close and the action was in effect *quare clausum fregit.* An entirely different rule prevails in such actions because the loss of the use of the property is included in the principal damages awarded rather than as interest, and if any interest is allowable, it is as punitive or enhanced damages.

The case of *United States* vs. *Sanborn,* 135 U. S. 271, 34 L. Ed. 112, contains certain elements which render it valueless in the case at bar. The Court declined to allow interest for the detention of the money because of the long delay in instituting the suit; but it is also to be noted that the moving reason for such disallowance was the fact that the money had voluntarily been paid to the defendant by the officials of the Government under a misinterpretation of a contract. It was not a case where the defendant converted property by taking physical

possession without the consent or permission of the owner.

2. The authorities supporting the allowance of interest.

In the case of *Vance* vs. *Vandercook Co.* (No. 2), 170 U. S. 468; 42 L. Ed. 1111, Mr. Justice White reviews carefully all of the cases where the question of the measure of damages is considered. It is true that this case was based upon the State statute of South Carolina, but in reviewing the cases and concluding that there was no difference between the rule prescribed by the statutes of South Carolina and the rule under the common law, the Court quoted the following from the case of *Sullivan* vs. *Sullivan,* 20 S. C. 509:

> "The code has made no material changes in the primary rights of parties, or in the causes of actions, nor has it given any new redress for wrongs perpetrated. It has only changed the mode by which such redress is reached and applied. The rights and remedies (using the term 'remedy' in the sense of 'redress') are still the same. * * * The action below was an action for the recovery of personal property and damages for its detention. It was an action in the nature of the old action of trover. It will not be denied that in actions of that kind, under the former practice (as a general rule), damages for detention beyond the property itself could be and were uniformly recovered, such damages being measured by different rules, according to the character of the property and the circumstances of each case. See case of *McDowell* vs. *Murdock,* 1 Nott & M'C. 237 [9 Am. Dec. 684], where the Court said: 'It has lately

> been determined by this Court, in several cases, that a jury cannot give vindictive damages in an action of trover. The value of the property, with such damages as must necessarily be supposed to flow from the conversion, is the true measure. Such, for instance, as the work and labor of negroes; interest on the value of dead property.' *Buford* vs. *Fannen,* 1 Bay, 2d ed. 273 [1 Am. Dec. 615]; *Harley* vs. *Platts,* 6 Rich. L. 318; *Kid* vs. *Mitchell,* 1 Nott & M'C. 338 [9 Am. Dec. 702]."

After quoting as above and deciding that the South Carolina statute had not changed the rights of the parties under the common law, the Supreme Court of the United States said (42 L. Ed. 1115):

> "Under the decisions to which we have referred, it is evident that, in the case at bar, the measure of damages for the detention was interest on the value of the property from the time of the wrong complained of. This rule of damages has been held by this Court to be the proper measure even in an action of trespass for a seizure of personal property where the facts connected with the seizure did not entitle the plaintiff to a recovery of exemplary damages. An action of this character was the case of *Conrad* vs. *Pacific Insurance Co.,* 31 U. S. 6 Pet. 262 [8:392]. In the course of the opinion there delivered by Mr. Justice Story, the Court held that the trial judge did not err in giving to the jury the following instruction:
>
> "'*The general rule of damage is the value of the property taken, with interest from the time of the taking down to the trial.* This is generally considered as the extent of the damages sustained, and this is deemed legal compensation with reference solely to the injury done to the property taken, and not to any collateral or con-

> sequential damages, resulting to the owner, by the trespass'." (Italics supplied.)

And in summing up the case, the Court on page 1116 (42 L. Ed.) said: "and such recovery was confined, as we have seen, to interest on the value of the property."

In *Winchester* vs. *Craig,* 33 Mich. 205, the Trial Court (p. 207) instructed the jury that they should allow interest from the time of the conversion. In discussing the case, the Supreme Court of Michigan (p. 215) quoted from *Hill* vs. *Canfield,* 56 Pa. St. 454, as follows:

> "It has not been an unusual thing in practice to allow damages beyond the actual value of the goods converted, *and interest,* although the general rule undoubtedly is the value of the goods *and interest."* (Italics supplied.)

On page 208 of the opinion, it appears that the Court had given careful consideration to all of the authorities defining the proper measure of damages in cases of conversion, and they said in substance that the general rule is that interest must be added to the value of the property; and it is to be noted that in reaching this conclusion, the Court makes no distinction between cases of innocent conversion and cases of wilful conversion. In finally approving the instruction given by the Court below, the Supreme Court said that the instruction was correct.

In the case of the *United States* vs. *Pine River Logging and Improvement Company,* 89 Fed. 907,

the Government contended that it had a right to recover the expenses incurred by it in tracing the property in question and in gathering the evidence to maintain the action. On appeal, the Government assigned as error the failure of the Court to instruct the jury to include in its verdict such expenses. It did not ask interest on the value of the property converted, but in reviewing the action of the lower Court in refusing to instruct the jury as requested, the Court of Appeals said:

> "The rule permitting a plaintiff in an action of trover to have an allowance for expenses by him incurred in recovering property that has been wrongfully taken seems to have been applied heretofore only in those cases where the property is actually recovered by the plaintiff, and such recovery is pleaded by way of mitigation of damages. When the damages are thus mitigated, the plaintiff is permitted to recoup his necessary expenses in recovering the property; but where there has been no eventual recovery of the property by the plaintiff, and he is compelled to take its value, as in the case at bar, the better view seems to be that the recovery is limited to the market value of the property at the time and place of conversion, *and interest. Ewing* vs. *Blount,* 20 Ala. 694; *Collins* vs. *Lowry,* 78 Wis. 329, 47 N. W. 612; *Cattle Co.* vs. *Hall,* 33 Fed. 236, and cases there cited; 3 Suth. Dam. (2d Ed.), par. 1141. No error was committed, therefore, by the Trial Court in excluding the evidence as to expenses that had been incurred by the United States which it sought to introduce."

The case of *New Dunderberg Mining Co.* vs. *Old, et al.,* 97 Fed. 150, is directly in point. In this case,

the plaintiffs did not pray for interest on the value of the ore wrongfully taken from the mining ground in question. In instructing the jury the Court said in substance that the plaintiffs were entitled to recover not only the value of the royalties which the Dunderberg Co. had received from the ore wrongfully removed, but also interest on such sum from the time it was enjoined from further working the mine. The Dunderberg Co. prosecuted an appeal from the judgment rendered in the lower Court, and, among other grounds, assigned as error the action of the Court in instructing the jury as it did in the matter of interest. The Court of Appeals, in passing upon this question, on page 153, said:

> "The damages recovered in this case consist of the royalties which the Dunderberg Company had received from ore removed from this mine by its lessees prior to February 15, 1894, when they were enjoined from taking more, and interest on the amount of these royalties from that date. It is assigned as error that the Court instructed the jury that the defendants in error were entitled to this interest. It is said that this charge was erroneous, because the recovery of interest in a case of this character was unauthorized by the statutes of Colorado; because the damages sought were unliquidated, and no interest can be allowed on unliquidated damages; because the allowance of interest as damages is discretionary with the jury, and it is not the province of the Court to direct its recovery; and because the complaint contained no prayer for interest. It is a general and just rule that, where interest is reserved in a contract, or is implied from the nature of the promise, it is recoverable of right; and that, when

property or money has been wrongfully appropriated or converted by a defendant, interest should be given as damages to compensate the complainant for the loss of the use of the proceeds of his property or of his funds. In cases of the latter class, its allowance is sometimes a matter of discretion, but generally, whenever one has wrongfully detained or misappropriated the money of another, he ought to pay and must pay interest at the legal rate from the date of the misappropriation, or from the beginning of the detention. *Cooper* vs. *Hill,* 36 C. C. A. 402, 94 Fed. 582; *Redfield* vs. *Iron Co.,* 110 U. S. 174-176, 3 Sup. Ct. 570; *U. S.* vs. *North Carolina,* 136 U. S. 211-218, 10 Sup. Ct. 920; *Jourolmon* vs. *Ewing,* 47 U. S. App. 679-686, 26 C. C. A. 23-27, and 80 Fed. 604-607; *U. S.* vs. *Pine River Logging and Improvement Company,* 61 U. S. App. 69, 32 C. C. A. 406, and 89 Fed. 907; 1 Sedg. Dam., sections 301, 303. A statute giving express authority therefor is not indispensable to the recovery of interest for the wrongful detention of money or of the value of converted property, and where no such statute exists, a reasonable rate of interest, conforming to the custom of the locality, will be given by way of damages. *Young* vs. *Godbe,* 15 Wall. 562; *Beckwith* vs. *Talbot,* 2 Colo. 639, 650. When interest is recoverable as damages, the result is the same, whether it is given under the one or the other name, and hence it is error without prejudice that it is allowed as interest when it should have been allowed as damages. *McCreery* vs. *Green,* 38 Mich. 172. Repeated decisions of the highest judicial tribunal of the State of Colorado, followed by those of the Supreme Court of the United States, have established the proposition that in actions for mining and converting ore and in actions for the conversions of personal property, the injured party may recover, under the statutes of that State, not only the value of

the property converted, but also 'a sum equal to legal interest on the same from the time of the conversion.' Mills' Ann. St. Colo. 1891, sections 2251, 2252; *Refining Co.* vs. *Tabor,* 13 Colo. 41-59, 21 Pac. 925; *Machette* vs. *Wanless,* 2 Colo. 170; *Sutton* vs. *Dana,* 15 Colo. 98, 25 Pac. 90; *Perkins* vs. *Marrs,* 15 Colo. 262-266, 25 Pac. 168; *Sylvester* vs. *Craig,* 18 Colo. 44-48, 31 Pac. 387; *Cattle Co.* vs. *Mann,* 130 U. S. 69-79, 9 Sup. Ct. 458. This is the established rule in other jurisdictions. *Dows* vs. *Bank,* 91 U. S. 618-637; *Harrison* vs. *Perea*, 168 U. S. 311-324, 18 Sup. Ct. 129; *Smith* vs. *Bolles*, 132 U. S. 125, 10 Sup. Ct. 39; *Coulson* vs. *Bank*, 13 U. S. App. 39, 4 C. C. A. 616, and 54 Fed. 855; *Lumber Co.* vs. *Smith,* 2 C. C. A. 97, 51 Fed. 63; *Bradley* vs. *Geiselman,* 22 Ill. 494-498; *Railroad Co.* vs. *Cobb,* 72 Ill. 148-153. The case of *Refining Co.* vs. *Tabor,* 13 Colo. 41-59, 21 Pac. 925, has answered the contentions of counsel for the plaintiff in error that interest may not be allowed when the damages are unliquidated, and that it is error for the Court to direct the jury to give it. That case involved two actions for $25,000 and interest for converting and selling ore which had been taken from the plaintiff's mine. The amount recovered was only $18,388.12, so that the claim, when presented, was unliquidated, and yet the judgment was reversed because the Court below refused to instruct the jury to add to the amount of the value of the property a sum equal to legal interest from the time of its conversion. Moreover, while, as far as the knowledge of the Olds extended, their claim was unliquidated when they brought their suit, and they prayed for a judgment for $300,000, yet the knowledge of the plaintiff in error made the claim clear, definite and exact. It was the amount of the royalties which it had received from the ore taken from the mine of the defendants in error, and that amount was clearly dis-

closed upon its books of account. It could have prevented the running of interest by remitting the amount to its owners. The fact that they claimed more than was actually due them furnished no excuse to the Dunderberg Company for its failure to pay them the amount which was due, and no defense to their claim for interest for its detention."

The case of *Harrison* vs. *Perea,* 168 U. S. 311, was an action by an administrator to recover the assets of an estate from the defendant who had no right to them but who had converted them to his own use. In fixing the liability of the defendant, the Court declared that the plaintiff had a right to recover interest on the value of the property that had been converted. In disposing of this assignment of error, the Supreme Court, on page 324, said:

> *"Nor did the Court below err to the prejudice of the defendant in the matter of charging him with interest at six per cent on the amount of the assets converted by him. The interest is charged by reason of his conversion of the whole assets of the estate.* It is not a mere mingling of the funds with his own while recognizing his liability to repay them and having them at the same time ready to respond when demanded. It is a wholesale conversion of the entire assets. The facts found make the inference perfectly clear that such conversion was intended from the time of his marriage with the mother of the minor. His false entries in the reports are very strong evidence in that direction.
>
> "Neither is it a question of what profits (if any) have been made by an individual who has mingled trust funds with his own and used them for his personal benefit, although never denying

his liability to account. In such cases it is sometimes proper to inquire what profits have been made in order to charge the trustee with their amount, if greater than the usual rate of interest. This is not such a question. The defendant has, without the least right or title, taken moneys belonging to the estate of a deceased minor, and converted them substantially to his own use, while denying the right of an administrator of such estate to the possession thereof. *He is properly charged, at least, with the usual interest, without investigation into the question of what profits he may have made.*"

Sutherland on "Damages" (3d Ed., Vol. 1, p. 303, par. 105) says:

"And a party who is entitled to recover and must accept its value in place of the property itself should always be allowed interest on that value from the date which the property was lost or destroyed or converted. Whether he recovers the value for the failure of a vendor or bailee to deliver, or by reason of the destruction, asportation, or conversion of the property by the wrongdoer, interest is as necessary to a complete indemnity as the value itself. The injured party ought to be put in the same condition, so far as money can do it, in which he would have been if the contract had been fulfilled or the tort had not been committed, or the loss had been instantly repaired when compensation was due."

See also:

Sedgwick's "Elements of Damages" (2d Ed.), p. 137;

1 Sedgwick on Damages, 633;

Joyce on Damages, Vol. 2, p. 126, par. 1105;

Sutherland on Damages, Vol. 2, p. 969, par. 355.

In the case of *Anderson* vs. *Besser,* 91 N. W. 737, the Supreme Court affirms the judgment which was based upon the instruction of the lower Court, directing the jury to allow interest from the time of the conversion.

In the case of *Trustees of Dartmouth College* vs. *International Paper Co.,* 132 Fed. 92-106, the Court allowed interest on value of property taken.

In the case of *Tome* vs. *Dubois,* 6 Wall. 548, 18 L. Ed. 943, the Supreme Court of the United States approved an instruction by the lower Court allowing interest on the value of the property converted from the time of conversion.

In the case of *Clark* vs. *Whitaker, et al.,* 19 Conn. 319-330, the Court said:

> "The rule of damages, in this case, was the value of the property converted, *with interest from the time of the conversion.*"

In the case of the *United States* vs. *Eccles,* 111 Fed. 490, the Court on page 493 said:

> "I am of the opinion that the plaintiffs are only entitled to recover the value of the timber standing in the trees at the time of the taking, and before the acts of the defendants had increased its value, together with legal interest from November 4, 1899, as damages for the time during which plaintiffs have been deprived of their property. *Mining Co.* vs. *Old,* 38 C. C. A. 89, 97 Fed. 150."

We invite attention to the note appended to the

case of *Fell* vs. *Union P. R. Co.,* 28 L. R. A. (N. S.) 1, and particularly that portion of the note found on pages 28 *et seq.,* where the question of allowance of interest for the conversion of property is fully discussed, and a general rule established that interest will be allowed from the time of conversion.

See also *Ward* vs. *Carson River Wood Co.,* 13 Nev. 44-60-62-64.

We therefore respectfully submit that the plaintiff in error failed to properly preserve his exception to the Court's instruction, and that the Court's instruction on the question of interest was entirely proper.

V. The Court did not err in instructing the jury that, if the manner of taking the timber was such as to enhance plaintiff's difficulty in establishing the exact quantity and value of the timber so taken, then the law authorized the jury to indulge every fair and reasonable inference justified by the circumstances in fixing the amount that the plaintiff was entitled to recover.

We will not consume the time of this Court in attempting to answer in detail the fatuous remarks of counsel with respect to the language of the Court in this instruction. It is sufficient to point out that the trespass committed by the defendant and his associates covered a wide area of country; that they were engaged in cutting indiscriminately from public and private lands, and that they cut without

regard to section lines or natural objects. Under their plea of the statute of 1878, they were required by the rules and regulations of the Secretary of the Interior to keep a set of books showing the sections from which the timber was cut and removed, and in the event no survey of the land existed, they were required to describe the localities by natural objects. This they wholly failed to do and they left plaintiff to its own resources to acquire such knowledge as it could, after a long lapse of time, as to the location and quantity of the cutting. The cross-examination of the timber cruisers who estimated the timber for the Government shows clearly that counsel for the defendant tried to create in the minds of the jury the impression that the estimates given were wholly incorrect and were the result of mere guess rather than of accurate measurements. The Government was compelled to pursue this method in estimating the amount of timber solely because the defendant and his associates failed to keep the records required. If they had been acting in good faith and performed their duty under the regulations, the jury would have known exactly the amount of timber that had been cut and we would not have been remanded to the work of the cruisers. It was solely because of the attitude of the defendant and his associates in the cutting, and of counsel in their cross-examination of the cruisers, that called for the instruction now complained of. It was taken almost verbatim from the case of *Sauntry* vs. *United States,* 117 Fed. 132, where the Court said (pp. 133-4-5):

"This action was brought by the United States against the plaintiffs in error to recover damages for cutting and taking away from lands of the United States timber standing and growing thereon. At the trial of the case in the Court below, there were two contested questions of fact: (1) Did the plaintiffs in error cut any timber from the lands described in the complaint? (2) If so, how much timber was cut by them? It appeared from the evidence that the timber was cut from the lands in question between October 1, 1887, and May 1, 1891. The United States discovered the trespass in 1895, and Special Agent Johnson went upon the lands in question for the purpose of making a scale of the timber which had been cut. Richard H. Peck, George W. Harmon and William Mack assisted in this work. Two witnesses—Peck, called by the United States, and Harmon, by plaintiffs in error—testified as to the amount of timber cut. Their estimates substantially agreed. These two witnesses, from the very nature of the case, could only estimate the amount of timber cut by measurement of the stumps and tops of trees found years after the trespass had been committed. The trial below took place in July, 1901, and resulted in a verdict for the United States. The learned trial judge, in his charge to the jury, used the following language:

" 'Now, that is a difficult question to prove. These transactions date far back in time, and that would make it difficult to prove if there were no other difficulties in the case; but if you are satisfied that the defendants cut and removed the timber from these lands, then you will see that the very act makes it very difficult, if not impossible, to prove the extent of the wrong which they did, and that the wrongful act enhances the difficulty of the proof. But

there is a rule of law which will aid you in passing upon that feature of the case. If you are satisfied from the evidence that the defendants cut and removed the timber from these lands, then in ascertaining the quantity of the timber so cut and removed, you may take into consideration the fact that the wrong of the defendants makes the determination of the quantity of such timber difficult. The law will not allow a wrongdoer to profit in any way by his own wrongful act. I will explain that matter to you somewhat more fully in the latter part of my charge. But for the present now, I say the law will not allow a defendant to profit by reason of the fact that he has made the establishment of the exact quantity of timber difficult. In this connection you must bear in mind that I am assuming all the time that you will find the defendants were the parties who cut and removed the timber from these lands. If you do not find that to be the fact, then this portion of the charge has no relevancy whatever to the case. It is all based upon the assumption that you find that they were the parties who cut and removed the timber; then if, upon a fair and full consideration of all the evidence in the case, you are still in doubt as to the quantity of timber which they cut and removed, you may indulge every fair and reasonable inference justified by the evidence in favor of the plaintiff and against the defendants. The rule has been very well stated in the following language: When the nature of a wrongful act is such that it not only inflicts an injury but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrongdoer, and supply the deficiency of proof caused by his misconduct by making every reasonable intendment against him and in favor of the person whom he has injured.'

"To the giving of this charge the plaintiffs

in error excepted, and it is assigned as error here. Counsel for plaintiffs in error does not deny the correctness of the rule of law stated by the Trial Court, but denies that the case on trial was one in which the rule could have any application, for the reason that there was no conflict in the testimony as to the amount of timber cut. It is true that the witnesses substantially agreed as to the amount of timber cut, but the way the witnesses arrived at their estimates, which was by measuring stumps and tops of trees years after the cutting, demonstrates that there was an inherent element of uncertainty in their calculations. If the defendants cut the timber, it is fair to presume that they had in their possession, or under their control, very much better evidence than was in the possession of the United States; so that whether we view the case as one where the evidence of the extent of the injury inflicted was destroyed by the trespass, or as a case where the exact amount of the timber cut was known to defendants, but which evidence they failed to produce, we think the charge of the Court complained of was applicable to the case on trial. The Trial Court repeatedly and guardedly instructed the jury that only in case the jury found that the plaintiffs in error cut the timber could they apply the rule stated in the foregoing charge. After all, what did the Court state to the jury? As a result of the rule of law announced, the Court said to the jury that, if they should find the plaintiffs in error cut the timber, then if, after a fair and full consideration of all the evidence in the case, they were still in doubt as to the quantity of timber cut and removed, they might indulge in every fair and reasonable inference justified by the evidence in favor of the United States and against the plaintiffs in error. The jury had the right, without being told, to indulge in any fair and reasonable in-

ference in favor of the United States which was justified by the evidence. 'All evidence,' said Lord Mansfield in *Blatch* vs. *Archer* (Cowp. 63-65), 'is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted.' It is said by Mr. Starkie in his work on Evidence (Volume 1, p. 54):

"'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.'

"We think that the case now under consideration afforded a proper occasion to invoke this principle in the law of evidence."

In view of the fact that the defendant admitted that at least a portion of the timber in question had been converted by his associates and claims the benefits of the Act of 1878, we submit that this case was one calling for the rule here laid down, and that it was not error for the Court to give the instruction complained of.

VI. The instruction relative to the timber taken from the land embraced in the homestead entry of Henry F. Edgar.

Counsel complained of the instruction given by the Court with respect to the timber cut and removed from the lands embraced in the homestead

entry of Henry F. Edgar. The evidence offered with respect to this particular tract of land shows conclusively that Edgar occupied it only so long as was required to cut the saw timber and dispose of it to the defendant and his associates. The evidence offered by the defendant, when given its most favorable interpretation, shows that Edgar resided upon the claim but a very short time, that his principal occupation was in furnishing supplies to the Fish Creek Camp of the Hammond people, and that he did not care sufficiently about the claim to procure a certified copy of his naturalization papers and submit it with his final proof. On the other hand, the evidence offered by the Government shows that the entry was cancelled because of his lack of good faith, and his failure to reside upon and cultivate the land in the manner required by law. Counsel complained of lack of fairness in the trial of this suit, but we submit that the manner in which plaintiff introduced the record respecting the cancellation of this entry shows that counsel for the Government was over-zealous in keeping out of this record and from the jury anything which might tend to prejudice the defendant. Instead of offering the entire record of the General Land Office, which was competent, to show the true reason why the homestead entry of Henry F. Edgar was cancelled, the record was submitted to the Court and the Court made a statement of its conclusions rather than reading the entire record to the jury. We quote from p. 723 of the transcript, as follows:

"Mr. Hall: We desire to offer in evidence the records of the General Land Office showing why the homestead entry of Henry F. Edgar was cancelled by the Department of the Interior.

"Thereupon a discussion ensued between counsel for each side of the Court concerning the admissibility in evidence of said records, it appearing that there was much hearsay and immaterial matter contained therein, and it was finally agreed between the parties that the reason for the cancellation of said homestead entry of Henry F. Edgar by the Department of the Interior might be stated by the Court to the jury to be as follows:

"The Court (addressing the jury): The entry was cancelled by reason of the conclusion that it was not made in good faith, based upon the report of a Special Agent; such conclusion was reached by the Acting Commissioner of the General Land Office. Such conclusion was reached at a hearing at which Edgar was cited to appear, but did not appear."

In addition to this, the testimony of former Special Agent Helmick (Tr. pp. 133-4-5), former Special Agent George H. Reeder (Tr. pp. 136-7-8) and former Special Agent M. J. Haley (Tr. p. 163) shows conclusively that the residence and cultivation by the entryman Edgar was not in good faith. But a very small area, probably less than an acre, was put in garden and no effort whatever made to cultivate the portion of the claim from which the timber was cut. Witness Helmick testified: "As to whether the cutting had been done in such a manner as to indicate it had been done for the purpose of culti-

vating and the improvement of the land, or for the purpose merely of cutting and removing the timber, inasmuch as there was no ground cultivated whatsoever, my impression is that that land was cut off simply for the timber that was on it. I drew that conclusion simply from the fact that there was not any cultivation and the logs had all been taken off, removed." Witnesses Haley and Reeder testified fully and positively to the same facts.

Counsel for the defendant rely solely upon the case of *H. D. Williams Cooperage Co.* vs. *United States*, 221 Fed. 234, which was decided by the Circuit Court of Appeals for the Eighth Circuit on March 1, 1915. The opinion of the Court in this case is not only contrary to the doctrine established by the Supreme Court of the United States and other Federal Courts, but the case was overruled in the recent case of *Union Naval Stores Company* vs. *United States* (No. 80—October Term, 1915. Decided February 21, 1916.) In this case, the Supreme Court of the United States said:

> "The facts, as they appeared at the trial, were as follows: Freeland had made an application for a homestead entry under Section 2289 Rev. Stat., but never perfected it. Being the owner of other lands in the same neighborhood, Freeland agreed with one Rayford to give him a turpentine lease for a lump sum upon all of his timber, not including the homestead. A third party having been employed to reduce the agreement to writing, Freeland discovered that the homestead had been included, and he called Rayford's attention to this and

tendered back the check given for the consideration money, on the ground that if the homestead was included in the lease, he would be in danger of losing his entry. Rayford replied: 'There is no law against turpentining a piece of homestead land as long as you are on it.' And so Freeland made no further objection. * * *

"There was no error in charging that 'the boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it was public land (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, wilful trespass, although he may have acted without knowledge of the illegality of the act, and that from such persons the United States are entitled to recover the value of the product manufactured from such crude turpentine by the settler, or from any person into whose possession the same may have passed.' This refers, of course, as other parts of the charge clearly show, to a manufacture by Rayford, who was himself the trespasser.

"The rights and privileges of an entryman with reference to standing timber were considered and discussed in *Shiver* vs. *United States,* 159 U. S. 491-497-498, where, after reviewing the pertinent sections of the Revised Statutes, it was said: 'From this resume of the homestead act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; . . . third, that meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the

door to manifest abuses of such right. Obviously, the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation. . . . It is equally clear that he is bound to act in good faith to the Government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it. With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. . . . By analogy, we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the Court below, to exchange such timber for lumber to be devoted to the same purposes; but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation.'

"There is nothing in the letter or policy of the homestead acts that permits the boxing and chipping of pine trees for the purpose of extracting turpentine for sale and profit. It cannot be regarded as cultivation within the meaning of the act; it affects the value of the inheritance too seriously for that. As is well known, the process requires the cutting of a deep gash or 'box' into the side of the tree, so shaped as to catch and retain a considerable quantity of the crude gum, and repeated chippings thereafter, by each of which an additional portion of the bark is cut through to the wood so as to expose a fresh bleeding surface. It not only saps the vital strength of the tree

and lessens its power to resist the force of the wind, but exposes the wood to decay and to wood-boring grubs and beetles; while the waste gum, being highly inflammable, increases the danger of forest fires. Government publications have repeatedly pointed out the ill effects of the practice. * * *

"Rayford, in conducting his turpentining operations upon the homestead with notice that the land was the property of the United States, became a wilful trespasser, although he may have supposed, as he is said to have declared, that there was 'no law against it.' He acted with full notice of the facts, and his mistake of law cannot excuse him."

The opinion of the Circuit Court of Appeals for the fifth circuit in *Parish et al.* vs. *United States,* 184 Fed. 590, is directly contrary to the opinion of the eighth Circuit Court of Appeals in *H. D. Williams Cooperage Co.* vs. *United States, supra. Parish* vs. *United States* is cited with approval in the case of *Union Naval Stores Company* vs. *United States, supra.* In *Parish* vs. *United States,* the Court of Appeals said:

"After all the evidence was introduced and the arguments had, the Court instructed the jury as follows:

"'That Wyatt S. Parish was in law a wilful trespasser in extracting gum from the trees on his homestead, and for that reason the defendants are liable for the value of the spirits of turpentine and rosin manufactured from the gum, and not merely for the value of the crude gum; that they (the jury) should find for the plaintiff the value of the spirits of turpentine

and rosin manufactured by defendant, W. L. Parish, from the gum purchased by him from Wyatt S. Parish, who extracted it from trees upon his homestead.'

"The defendants excepted to these charges, and requested the Court to instruct the jury:

"'If you find from the evidence that the homesteader, Wyatt S. Parish, in boxing trees and extracting the gum from his homestead, honestly and really believed that he had the right to do so, and that he had no intention of defrauding the Government by so doing, or of taking property not his own, then you should find as damages the value of the crude gum, and not the value of the manufactured product.'

"And again:

"'Even though, under the law, Wyatt S. Parish had no right to extract gum from the trees on his homestead, still, if he honestly believed that he had the right, and did not intend to defraud the Government of property which he knew belonged to it, and he extracted and sold the gum under the bona fide belief that he had the right to do so, and he was at the time in good faith complying with the law requiring residence and cultivation and the like to enable him to perfect his homestead entry and really intended to so perfect it, then he was not a wilful trespasser, and the damages should be estimated at the value of the crude gum, and not the value of the manufactured product.'

"These requests the Court refused, and the defendants excepted. There was a verdict and judgment for the plaintiff, and the defendants sued out error, and under suitable assignments submit that the Trial Court erred in the charges given and in refusing the requested charges.

"In our opinion, neither of these assignments of error is well taken. The charges given by

the Court correctly stated the law, and the requested charges were rightly refused. We cannot follow the counsel for the plaintiffs in error through an examination of all the cases which his commendable research has enabled him to place upon the brief. Besides, the well recognized principles of justice and the practice in equity, which Courts of law now generally adopt, a few comparatively recent and pertinent cases amply support the view of the law taken by the trial judge. We content ourselves with referring to these cases: *Woodenware Company* vs. *United States,* 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *United States* vs. *Taylor* (C. C.), 35 Fed. 484; *Shiver* vs. *United States,* 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231, and the sections of the Revised Statutes cited in the opinion of the Court in the Shiver case.

"This view as to what the law was at the time the trespass in this case was committed has, in our judgment, been approved by Congress by the Act of June 4, 1906, making such trespasses a misdemeanor. Act June 4, 1906, c. 2571, 34 Stat. 208."

See also:

Shiver vs. *United States,* 159 U. S. 491, 40 L. Ed. 231;

U. S. vs. *Taylor,* 35 Fed. 484;

U. S. vs. *Murphy,* 32 Fed. 376;

U. S. vs. *Cook,* 86 U. S. 19 Wall. 591, 22 L. Ed. 210;

Bunker Hill M. & C. Co. vs. *U. S.,* 226 U. S. 548, 57 L. Ed. 345;

Stone vs. *U. S.*, 167 U. S. 178, 42 L. Ed. 127.

VII. The instruction relative to the character of the Hell Gate lands.

The Court instructed the jury as follows:

"In this case defendant has offered no evidence tending to show a compliance with these regulations, and I accordingly instruct you that for that reason defendant has failed to bring himself within the protection of the statute of 1878, and is not relieved of liability for any timber so cut since that regulation was adopted by reason of the fact that said lands may have been in fact mineral in character. You may, however, as indicated by the ruling of the Court during the trial, consider the evidence offered by defendant and admitted, touching the character of the land along the Hell Gate, as bearing upon the question of the good faith of those taking timber on those lands in the asserted belief that they were entitled so to do by reason of the lands being mineral in character, solely for the purpose of determining the measure of damages for such taking in the event you find the defendant responsible therefor.

"In this connection and as bearing on the question of such good faith, you will understand that the phrase 'said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry,' as used in the Act of June 3, 1878, does not mean that a person is entitled to cut from the public domain merely because of the fact that there may be some known mineral lands within the vicinity of the lands from which timber is cut. Nor does the term mineral lands as here used include all lands in which minerals may be found, but only those lands where the mineral exists in sufficient quantity to pay for its extraction and known to be such at the time and

to the persons cutting. If the land in question is worth more for agricultural purposes than mining, it is not mineral land within the meaning of the Act, although it may contain some measure of gold or silver or other valuable minerals. This is also true of timber lands. If the lands along the Hell Gate River from which a portion of the timber in question was cut, were more valuable for the timber standing and growing thereon than for the minerals contained therein, then such lands were not mineral in character and not subject to entry under the then existing mineral laws of the United States, and neither the defendant nor the corporations named had a right to cut timber from such lands under the Act of June 3, 1878. These things anyone taking timber from such lands is presumed to know, and if timber is taken without actually ascertaining the character of the land, it is taken at the peril of being held responsible therefor."

Counsel contend that this instruction was erroneous because it said that if the lands in question were more valuable for the timber thereon than for the mineral contained therein, the defendant and his associates had no right to cut therefrom under the Act of June 3, 1878. They object most strenuously to this test of comparative value and say that the only test was whether or not the lands contained mineral in any appreciable quantity or in sufficient quantity to permit a mineral entry thereon being made. They cite in support of their contention *Chrisman* vs. *Miller,* 197 U. S. 313, 49 L. Ed. 770; *Steele* vs. *Tanana Mines R. Co.,* 148 Fed. 678, 78 C. C. A. 412, which cases are not in point because there the question was as to whether or not there was

sufficient mineral in the lands involved to warrant their entry under the mining laws, and the question of diligence between contending locators. The language of the Mineral Land Act of June 3, 1878, and of the Timber and Stone Act of the same date, is sufficient to show the distinction between those cases and the one at bar. The Mineral Land Act of June 3, 1878, contemplates only those lands which are "mineral, and not subject to entry under existing laws of the United States except for mineral entry." The Timber and Stone Act of the same date requires that land, in order to be entered thereunder, must be "valuable chiefly for timber" or "valuable chiefly for stone." This clearly indicates that lands containing some slight quantity of mineral might properly be entered under the Mineral Land Act, and also that if the same lands had growing on them sufficient timber to render them more valuable for the timber than for the slight mineral content, they might be entered under the Timber and Stone Act. It therefore follows that the language of the Mineral Land Act of June 3, 1878, does not mean that timber may be cut from lands which contain any quantity of mineral, however small. The Act clearly says that if they may be entered under the Timber and Stone Act, then they do not fall within the provisions of the Mineral Land Act of June 3, 1878. This question was fully discussed and determined by the Supreme Court of the United States in *United States* vs. *Plowman,* 216 U. S. 372, 54 L. Ed. 523, and the Court on page 525 (L. Ed.) said:

"The instructions appear to us to have paid too little regard to the words of the Act, defining the land on which it permits timber to be cut as 'mineral, and not subject to entry under existing laws of the United States, except for mineral entry.' As was said in *Northern P. R. Co.* vs. *Lewis*, 162 U. S. 366-376, 40 L. Ed. 1002-1006, 16 Sup. Ct. Rep. 831, 'the right to cut is exceptional and quite narrow,' and the party claiming the right must prove it. The only lands excluded in 1878 or now from any but mineral entry are lands 'valuable for minerals' or containing 'valuable mineral deposits.' Rev. Stat., secs. 2302-2318-2319, U. S. Comp. Stat., pp. 1410, 1423, 1424. See section 2320. The matter was much discussed in *Davis* vs. *Wiebbold,* 139 U. S. 507, 35 L. Ed. 238, 11 Sup. Ct. Rep. 628, and there it was said that the exceptions of mineral land from pre-emption and settlement, etc., 'are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant.' P. 519. A Land Department rule is quoted, with seeming approval, that 'if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver,' pp. 521, 522, citing *United States* vs. *Reed,* 12 Sawy. 99, 104, 28 Fed. 482. Again it was said: 'The exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were, at the time of the grant, known to be so valuable for their minerals as to justify expenditure for their extraction.' P. 524. These are the tests to which the Act of 1878 must be taken to refer, since it refers to and rests upon the statutes construed to adopt these tests.

"It is said that such a construction empties the statute of all its use, because if the land is known to be valuable for minerals, a mining claim to it will be located, only the owners of which can cut the timber, whereas the statute gives the right to all residents. If that were true, Courts still would be bound by the explicit and unmistakable words. It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective. But the objection is stated too strongly. As pointed out at the argument, in 1878 probably there was a great deal of mineral land still unexplored on which claims had not been located, not to speak of mere exceptional cases in which the act would apply. The regulations of the Secretary of the Interior for a long time, and it would seem always, have been in accord with our opinion and the language of the act."

VIII. The reception and rejection of certain evidence.

A. The refusal of the Court to permit the witness, W. H. Hammond, to testify as to the terms of the lease under which he rented the Bonner Mill from the Blackfoot Milling & Manufacturing Co.

Counsel for the defendant assign as error the action of the Court in refusing to permit the introduction in evidence of the purported lease dated the 10th day of February, 1888, from the Blackfoot Milling & Manufacturing Co. to W. H. Hammond.

The lease itself is not incorporated in the record, but it is shown that the paper offered by the defendant was signed by the witness, Wm. H. Hammond,

and by one Charles H. McLeod, who represented himself thereby to be the President of the Blackfoot Milling & Manufacturing Co. There was no seal of the corporation, nor was any attestation by the Secretary attached to the document. It was not shown by the witness, Wm. H. Hammond, or by anyone else, that the paper offered was the original instrument executed, and there was no accounting for the loss or destruction of the original document. The plaintiff objected to the admission of the paper offered for the reason that it did not bear on its face any authority from the Blackfoot Milling & Manufacturing Co. for its execution; that it was merely signed by the President; was not acknowledged before a Notary Public, and that it purported to be an instrument affecting the right of possession to real property for more than a year. The Court sustained the objection for the reason that there was no proof that the paper offered had been executed by the corporation purporting to execute it. Thereupon, and without attempting to account for the loss or destruction of the original instrument, counsel for the defendant attempted to prove its contents by the witness Hammond. The questions asked the witness apparently were not for the purpose of altering or in any manner changing the terms of the lease, but were simply an attempt on the part of counsel to have the witness recite the terms as expressed in the lease. This the Court declined to permit them to do, and rightly so, because it is well settled that the terms of an instrument of this sort

cannot be proven by parol evidence unless the original instrument has been lost or destroyed. The transcript shows that such an instrument was executed, and it was the duty of the defendant to either produce it or account satisfactorily for its absence. The paper which they offered in evidence was in no wise competent because of its lack of proper execution by the corporation. It is also apparent that the sole purpose of this offer was to prove that the witness, Hammond, had operated the Bonner mill under lease from the Blackfoot Milling and Manufacturing Company. The record (Tr. p. 434-5, 438) discloses that the witness had already testified as to the existence of such lease and his operation of the mill under it, and we submit that the Court did not err in excluding the testimony of the witness as to the specific terms of the instrument itself.

B. The two affidavits relative to the mineral character of the Hell Gate lands.

Objection is also made that the Court refused the defendant the right to read to the jury the two affidavits respecting the mineral character of the lands embraced in the trespass complained of. These affidavits are incorporated in the record (Tr. p. 560-2). They were objectionable for two reasons. *First.* It was not proper to present to the jury *ex parte* evidence of the mineral character of the lands in controversy. The evidence shows that the witness, Fenwick, claimed to rely upon these affidavits

and he so testified; but to submit the substance of the affidavits to the jury would have been allowing them to hear and consider purely hearsay evidence. It was competent, and the witness, Fenwick, testified without objection, that he based his belief as to the mineral character of the territory upon information that he had received; but we submit that it would have been highly improper to have permitted him to have recited in detail all of the conversations that he had with various persons respecting the character of the land. This in effect would have been permitting the makers of the affidavits to have testified without affording the plaintiff opportunity to cross examine them with reference to the specific lands involved in suit. *Second.* An examination of the affidavits discloses that they did not refer to any specific lands, but were of a general nature, embracing "land and country lying along the line of the Northern Pacific Railroad between the town of Missoula and the town of Bearmouth." There is nothing in these affidavits to indicate that the lands now in controversy are included in the area of country described, and, if for no other reason, we insist that they were incompetent, irrelevant and immaterial, because they were too general and did not refer to the lands in controversy.

C. The defendant's testimony as to the extent of his holdings in the Missoula Mercantile Co. in the year 1906.

Error is assigned because the Court compelled the defendant to testify with respect to the value of his

stock in the various corporations concerned in these transactions. In view of the testimony of defendant on direct examination, we insist that he was not prejudiced by the questions and answers objected to. It is to be noted that his answers to all of the questions, except that found on page 710, where he stated the value of his holdings in the Missoula Mercantile Co., were evasive and would in no manner tend to prejudice him before the jury. He gave no definite answer to any of the questions propounded. However, in the question last referred to, he did state that his holdings in the Missoula Mercantile Co. were worth at least $250,000 or $300,000. We do not believe that this was sufficiently prejudicial to cause this Court to reverse the judgment. Upon his direct examination, the defendant recited his entire history in great detail. He started with his arrival in the town of Missoula in 1868, and, with some show of pride, in which he was joined by counsel, he related the entire history of the amassing of a great fortune. In view of the fact that he is here charged with having committed the depredations through the instrumentality of the various corporations named, we cannot see that he was prejudiced to any extent by this one question which stated the value of his holdings in the Missoula Mercantile Co. In order that he might be rendered liable in this case, it was necessary to a certain extent to show that he had derived some benefit from the conversion complained of, and we frankly submit that his answer to this question shows that his interest in the Missoula

Mercantile Co. increased from time to time, and it is not unreasonable to suppose that such increase was due largely to the transactions here complained of.

D. The Court did not err in admitting in evidence part of the duplicate assessment books of the County of Missoula relating to the assessment of the Missoula Mercantile Co.

These duplicate assessment lists were offered by the plaintiff on the theory that they were declarations against interest made by corporations of which the defendant was the managing director and one of the officers. Foundation for their introduction was laid by the testimony of C. H. McLeod and Gust Moser, who testified that the assessment lists were prepared by Mr. Moser and submitted to the board of directors before being handed to the County Assessor. Counsel for the defendant cite no authorities which condemn the introduction of such evidence, and we do not believe that it is necessary to cite any authorities in support of our contention that they were declarations against interest which were material because the defendant was, in effect, charged with a conspiracy to convert the timber in question.

Counsel have failed to point out wherein the matters complained of in any manner prejudiced the rights of the defendant in the trial of this case, and

we submit that if the admission or rejection of this evidence was error, it was harmless error and does not warrant the reversal of the judgment.

Klein vs. *Hoffheimer,* 132 U. S. 367, 33 L. Ed. 373;

Louisville & N. R. Co. vs. *White,* 100 Fed. 239.

IX. The Complaint.

By demurrer and amended demurrer, the defendant attacked the complaint and amended complaint. In both instances the demurrer was overruled, and counsel now complain that these demurrers should have been sustained. The principal burden of their complaint is that the pleading was indefinite and uncertain, and that it should have described with more particularity the property converted, the place from which and the time when converted. The complaint follows the form which has been used in the Federal Courts for many years without objection. It sets forth specifically the lands from which the timber was taken and the total quantity taken. The only place where it may be attacked for any uncertainty at all is with respect to the time of the commission of the acts complained of. The whole burden of the complaint is that it was a continuing trespass, and it is good pleading to allege the several dates of a continuing trespass as they were alleged in this complaint (31 Cyc. 106). It is also to be noted that all of the facts alleged in the complaint

were undoubtedly within the knowledge of the defendant, and in such instances the burden is not upon the plaintiff to allege with undue particularity the facts which the defendant himself knew (31 Cyc. 106). If defendant desired to know the exact amount of timber cut from each particular tract of land, the exact time of the cutting and by whom cut, he should have asked for a bill of particulars and not attempted to have elicited such information by demurrers. We submit that, on the whole, the complaint sets forth fully and definitely all of the elements required by good pleading (38 Cyc. 2065-6).

X. The re-reading of testimony after the jury had retired to deliberate.

Counsel have assigned as error the action of the Court in refusing to permit them to read portions of the evidence to the jury after it had retired to deliberate on its verdict. The record discloses that this situation was brought about solely by the action of the jury. They came into Court voluntarily and asked that certain portions of the testimony be reread to them. The Court thereupon, *and without objection from either party,* permitted the reading of the testimony of Sidney C. Mitchell and a portion of the testimony of Thomas G. Hathaway. Before the reading of Mr. Hathaway's testimony was completed, the Court interrupted the proceedings and inquired of the jury as to their ideas of the propriety of reading further. Thereupon counsel for the defendant objected to the discontinuance

of the reading of the testimony, and the Court permitted counsel for the plaintiff to continue the reading of the direct examination of the witness. At the close of the reading of the direct examination the Court retired from the court room and the members of the jury consulted together. Upon the return of the Court the foreman of the jury informed the Court and counsel that the jury had come to the conclusion that they did not care for the reading of any further testimony. The record discloses that the reading of the testimony was consented to by counsel for both parties. Counsel for the defendant do not now object to the fact that the jury was permitted to hear any of the testimony re-read, but contend that error was committed because the Court would not allow them to read the portions of the evidence they wanted to again present to the jury. While it is irregular to re-read any of the testimony to a jury, we do not believe that the plaintiff in this case should be penalized by a reversal of the judgment because of the action of the Court. The jury, without suggestion from Court or counsel, asked for the reading of the testimony and when they had heard sufficient to satisfy them, they so indicated to the Court. The authorities cited by counsel for the defendant in their brief are not in point because in all of those cases, either one or the other of the parties objected to the re-reading of the testimony. In the case of *Padgitt* vs. *Moll,* 159 Mo. 143, 52 L. R. A. 854, the Court condemns the practice of reading the evidence to the jury after it has retired to

deliberate, yet the part of the opinion on page 858 would seem to indicate that where such reading is without objection, it will not be considered erroneous, for it is said: "In this case, the learned judge should have adhered to his original purpose to allow the stenographer's notes to be read only on condition that counsel on both sides consented thereto."

On page 254 of their brief, counsel contend that they would have been benefited by the reading of the cross-examination of Hathaway because a portion of the testimony of said witness relating to the disposition made of the product of the Bonita mill was contrary to what the witness had testified on his direct examination. We cannot see how this could have been material because the jury's request for the reading of the testimony made no reference to the disposition of the product of the Bonita mill, but referred solely to the defendant's relations with the several corporations named. An examination of all of the evidence of Hathaway discloses that he did not make any contradictory statements whatever with respect to Mr. Hammond's relation to the four corporations involved. We submit, therefore, that the re-reading of the testimony was not prejudicial to the rights of the defendant, and that the judgment should not be reversed on that ground.

XI. The costs.

Defendant has assigned as error the action of the Trial Court in sustaining the Clerk in taxing the

costs of seven witnesses who attended the trial and came from various localities outside of the Northern District of California.

It appears that all of these witnesses resided in the States of Montana, Washington and Idaho, and while it does not appear from the record, we assume that counsel will not be offended if we state that all these witnesses traveled via Portland, reaching the Northern line of this District where it is crossed by the Southern Pacific Railroad, a distance of 230 miles from the City of San Francisco. In taxing the costs of these witnesses, the Clerk allowed them mileage at five cents a mile for a distance of 460 miles, ~~plus~~ double the distance from San Francisco to the Northern line of the District. We appreciate the attitude of counsel with respect to this assignment of error. We feel confident that it is not made because of the few dollars and cents involved, but in order that this question may be definitely settled. With that same purpose, we review the cases in which this question has been passed upon in order that this Court may have before it the different views of the judges who have had to deal with this question.

FIRST CIRCUIT

In *Prouty* vs. *Draper,* 2 Story 199, Fed. Cas. No. 11447 (1842), it was held that mileage should be taxed for witnesses from their places of abode re-

gardless of distance; that while the Judiciary Act of 1789 authorized the taking of depositions beyond the 100-mile limit, such taking was optional.

Under the existing statute, a party may take the deposition of a witness residing more than one hundred miles from the place of trial, at his option, regardless of whether or not such witness lives within or without the District.

In *Whipple* vs. *Cumberland Cotton Mfg. Co.,* 3 Story 84, Fed. Cas. No. 17515 (1844), it was held that a witness going from Boston, Massachusetts, to Portland, Maine, should be allowed mileage for the entire distance. In this case, the losing party, the defendant, contended that the allowance of mileage for the witness should be limited to the *State line.*

In *Hathaway* vs. *Roach,* 2 Woodb. M. 63, Fed. Cas. No. 6213 (1846), mileage was allowed from places of abode of witnesses, although they came from outside the State. In this case, Circuit Judge Woodbury held that he was constrained to so hold under the Act of February 28, 1799 (1 Stat. 626), but, in the absence of such statute, would have held in accordance with the State practice and limited the mileage to the *State line.*

In *United States* vs. *Sanborn,* 28 Fed. 299 (1886), it was held by Justice Gray and District Judge Colt that mileage should be taxed for *voluntary* witnesses

coming from outside the District and from more than one hundred miles from the place of trial. This case is the leading case in the First Circuit.

It appears from these cases that it has been universally held in the First Circuit that mileage for witnesses should be allowed from their places of abode regardless of District line or 100-mile limit.

SECOND CIRCUIT

In *Dreskill* vs. *Parish,* 5 McLean 241, Fed. Cas. No. 4076 (1851), it was held that mileage could not be charged for a witness who had not been served by the Marshal. In 5 Blatchford 134, Fed. Cas. No. 432 (1863), it was held that *traveling fees* for a witness were allowable to the extent to which a subpœna would run—that is, "for any distance within the District, but for not exceeding one hundred miles from the place of trial, unless the distance was wholly within the District." It is respectfully submitted that a fair construction of the language of the opinion does not tend to establish a one-hundred-mile limit. On the contrary, as we read it, the traveling fees of the witness in question should be allowed for the distance he had traveled to the extent that subpoenas for witnesses would run, but that the allowance should be limited to one hundred miles unless the witness had traveled within the District a distance in excess of one hundred miles.

In *Buffalo Ins. Co.* vs. *Providence etc. SS. Co.,* 29 Fed. 237 (1886), it was held by Judge Coxe that

the mileage of the witness residing outside of the District should be limited to one hundred miles. It will be noted that Judge Coxe held such hundred-mile limit to be necessary to obviate possible abuses, in that witnesses might be brought from remote parts of the country to testify on immaterial matters and the mileage therefor taxed against the losing party. It is submitted that the *District line limit* would obviate this danger as effectively as the one-hundred-mile limit. It is also true that good faith in subpoenaing of witnesses will be required by the Court in the matter of taxation of costs where the witnesses are subject to service as well as where they appear voluntarily.

In *The Syracuse,* 36 Fed. 830 (1880), it is held, as it was held in 5 Blatchford 134, that the *voluntary* witness in that case was entitled to mileage to the extent that he had necessarily traveled within the District and was not limited to one hundred miles unless the distance that he had traveled within the District was within that limit.

It appears from the cases cited in the Second Circuit that the rule there is to allow mileage for voluntary witnesses for the distance traveled through the territory subject to the process of the Court—that is, the distance necessarily traveled within the District whether that distance be more or less than one hundred miles, as established by the decisions in 5 Blatchford 134 and *The Syracuse,* 36 Fed. 830. By the ruling in *Dreskill* vs. *Parish,*

by inference, no mileage is allowable to voluntary witnesses, and by the ruling in *Buffalo Ins. Co.* vs. *Providence etc. SS. Co.,* the mileage of such a witness is allowable to the extent of one hundred miles only.

THIRD AND FOURTH CIRCUITS

In the cases from the Third and Fourth Circuits (one case from each circuit), it is held that the mileage of the witnesses should be limited to one hundred miles.

SIXTH CIRCUIT

In the cases in the Sixth Circuit, it is held that mileage should be allowed for one hundred miles. These decisions, however, are based upon the principle that mileage should be allowed for the distance that subpoena would run, and it is again respectfully submitted that in the case of a voluntary witness, whether he be a resident or non-resident of the District, that distance should be limited only to the distance that he has necessarily traveled within the District.

SEVENTH CIRCUIT

In *Eastman* vs. *Sherry,* 37 Fed. 844 (1889), it is held that mileage should be limited to one hundred miles; but in the opinion of Judge Jenkins, it is said:

> "It seems clear to me that Congress intended to allow mileage only to the extent that the subpoena would run."

In *Marks* vs. *Merrill Paper Co.,* 203 Fed. 16, which appears to be the only Circuit Court of Appeals decision upon the question, the allowance of mileage is limited to one hundred miles. The question is not discussed by the Court in that case at any length, and it does not appear whether the witness attended voluntarily or under subpoena.

EIGHTH CIRCUIT

In the cases from the Eighth Circuit, the rule seems to be established in that Circuit to allow mileage for voluntary witnesses attending from outside the District for the distance of one hundred miles only.

NINTH CIRCUIT

In *Spaulding* vs. *Tucker,* 2 Sawyer 50, Fed. Cas. No. 13221 (1871), Judge Sawyer held that witnesses who were served with subpoena outside of the District and more than one hundred miles from the Court, are voluntary witnesses, are not in attendance "pursuant to law," and that no mileage should be allowed for such witnesses.

In *Haines* vs. *McLaughlin,* 29 Fed. 70 (1886), the question again came before Judge Sawyer, sitting with District Judge Sabin, and Judge Sawyer again adhered to his former ruling that a witness not regularly subpoenaed was not in attendance in Court "pursuant to law." In that case, his associate, District Judge Sabin, dissented, adopting the

view of Mr. Justice Gray and Judge Colt, as announced in *United States* vs. *Sanborn,* 28 Fed. 299 (1886). Apparently, because of this difference of opinion between himself and his associate, Judge Sawyer suggested in the Haines case that, if desired, a certificate of opposition of opinion would be made, and that he hoped the case would be taken up for authoritative decision.

The view expressed by Justice Gray and District Judge Colt in *United States* vs. *Sanborn,* 28 Fed. 299, was in direct conflict with the earlier decision of Judge Sawyer in *Spaulding* vs. *Tucker,* 2 Sawyer 50, and was adopted after discussion of the Spaulding vs. Tucker case.

In the Sanborn case, Justice Gray held that in the phrase in Section 848 of the Revised Statutes "for each day's attendance in Court, or before any officer pursuant to law," the words "pursuant to law" would seem to have been inserted, not to restrict or qualify the effect of "attendance in Court," but rather to limit the attendance "before any officer."

In the Sanborn case, Justice Gray further stated:

> "But presuming them to apply to both classes of cases, it is only 'attendance pursuant to law,' not 'being summoned pursuant to law,' that is required to entitle a witness to his fees. A witness who, in good faith, comes to Court in obedience to a subpoena, or at the mere request of one of the parties, attends pursuant to law, and while coming, attending and returning, is

> privileged from arrest on civil process, even if he comes from abroad and has no writ of protection."—Citing cases.

This would appear to be the reasonable as well as the grammatical construction of the language employed in Section 848. It clearly provides that a witness shall be paid for his "attendance in Court, or before any officer" who is conducting a hearing pursuant to law.

In *Lillienthal* vs. *Southern Cal. Ry. Co.,* 61 Fed. 622 (1895), Judge Ross was constrained to follow the ruling of Circuit Court Judge Sawyer, but likewise expressed the hope that the question might be authoritatively settled.

In *Hanchett* vs. *Humphrey,* 93 Fed. 895 (1899), Judge Hawley held that "voluntary" witnesses were entitled to mileage whether coming from within or without the District, holding that such mileage should be allowed to the full extent "of the distance that could be legally reached by subpoena, viz.: At any place within the District or at any point without the District to the extent of one hundred miles from the place where the Court is held."

It is again earnestly submitted that the full extent of the distance to which subpoena could have run in the case at bar, over which the witnesses in question necessarily traveled, was the Northern line of the Northern District of California.

In *United States* vs. *Southern Pacific Co.,* 172 Fed. 909 (1909), Justice Bean held:

> "The rule, however, supported by the great weight of authority, is that the prevailing party in a civil action is entitled to charge, as a part of his costs, mileage for a distance necessarily traveled by a witness to attend the trial on his behalf from any place to which a subpoena will run."

That is, to the limits of the District, and one hundred miles where the limit of the District is less than one hundred miles distant. It is true, however, that notwithstanding the doctrine announced by Judge Bean, allowance was only made by him for mileage of the witness to the extent of one hundred miles.

The authorities upon the question of the allowance of mileage of witnesses, under Section 848, are collated under the footnote "Mileage" under that Section in Volume 7 of Federal Statutes Annotated, on pages 1124 and 1125. The true rule, as gathered from all these decisions, is correctly stated in the first authority cited under this footnote, *Hanchett* vs. *Humphrey,* per Hawley, District Judge, as follows:

> "The true rule upon this subject, as gleaned from all the authorities, is substantially to the effect that the Acts of Congress were intended to, and do, allow mileage to witnesses to the full extent of the distance that could be legally reached by subpoena, viz.: at any place within the District or at any point without the District to the extent of one hundred miles from the place where the Court is held."

If this is the true rule, then its reasonable application is to allow a witness mileage from the limit of the District if he necessarily and properly traveled that distance.

The "one-hundred-mile rule" seems to have been followed upon two distinct theories. First, that allowance of mileage should be limited to one hundred miles because, beyond that limit, the deposition of the witness might be taken. But upon this theory, there would be no reason for discriminating against a non-resident witness. The deposition of a witness residing in the District at a point more than one hundred miles distant from the place of trial can be taken, as well as the testimony of a non-resident witness, at the option of the party desiring to use the testimony.

The second and latest theory on which the one-hundred-mile limit is apparently based is that service of subpoena does not run for a non-resident witness more than one hundred miles from a place for trial. The only apparent logic for the support of the rule upon this basis would appear to be that mileage is not allowable for any witness who does not come from a point within the jurisdiction of the Court—that is, within the District or outside the District within one hundred miles. The result of such a holding would be that a litigant would be compelled to produce any witnesses beyond these limits at his own expense without any hope of reimbursement. This would be a very unjust rule, and the weight of authority is against it.

The provision of the statute that subpoena shall run out of the District to the extent of one hundred miles, is clearly applicable only to those Districts in which a District Court is located within one hundred miles of an adjoining District, and its intended effect was to extend the process of the Court into the adjoining District to that extent. That being true, there would seem to be no reasonable ground for the application of that provision of the statute to the allowance of mileage for witnesses, except in cases where the witnesses necessarily and properly traveled through this one-hundred-mile limit in an adjoining District to reach the Court.

The reasonableness of the matter, as well as the proper construction of the statutory provisions, would seem to dictate the rule that mileage should be allowed for a witness for the distance that he actually and necessarily traveled within the jurisdiction of the Court.

It appears that a majority of the Courts have adopted the one-hundred-mile limit rule in taxing costs for the mileage of witnesses coming from without the District. But the question is yet an open one in this District.

XII. The refusal of the Court to give certain instructions proposed by defendant bearing upon the liability of defendant for the timber cut.

On pages 156-157 of their brief, counsel for the defendant invite attention to certain instructions

which were refused by the Court, and contend that these instructions should have been given to the jury. All of these refer to specific portions of the timber alleged to have been converted, and we submit that the general principles therein involved were fully covered by the Court's instructions to the jury, and that it was not error for the Court to refuse to give the specific instructions complained of because they separated the facts surrounding the cutting from each particular tract. The Court fully instructed the jury generally as to the liability of the defendant, and we submit that it was not error to refuse to give the instructions asked by the defendant.

XIII. The verdict.

On pages 8, 9 and 260 of their brief, counsel, by very adroit argument, attempt to demonstrate that the verdict of $51,040.00 was arrived at by the following method of calculation, to-wit:

16,000,000 ft. of timber at $1 per thousand	$16,000.00
$1 per thousand feet as profit on 16,000,000 ft. of timber	16,000.00
Interest from 1895 to 1912—17 years at 7%, equal to 119% on the stumpage value	19,040.00
Total	$51,040.00

In order to arrive at this conclusion, counsel have wilfully ignored both the law and the evidence. In the first place, the Court peremptorily instructed

the jury that the defendant, if liable at all, was liable for the manufactured value of the timber taken from the Edgar lands, the Southeast quarter of Section 28, Township 13 North, Range 14 West. The testimony of William Greene (Tr. p. 78) shows that there were 1,557,025 feet board measure cut from this tract of land. In the computation made by counsel for defendant, they totally ignore this instruction of the Court and the amount of the timber taken. The evidence also discloses that this timber, when sawed and manufactured into lumber, was worth $10 per thousand feet. We therefore find that in their computation, counsel have totally ignored the Court's peremptory instruction. If they do now make such contention, their argument on pages 229-231 of their brief is wholly useless. If the jury ignored the instruction of the Court with respect to the wilfulness of the taking of the lumber from the Edgar lands, then the giving of such instruction was not such an error as to warrant this Court in reversing the judgment. It is equally true, if we are allowed to invade the field of presumption, to say that the jury wholly ignored the Court's instruction respecting interest, and simply determined that the Government had been damaged by the taking to the extent of $51,040.00. Another error which appears in their computation concerns the $16,000.00 which counsel say was allowed as profit on the amount of the timber taken. The instruction of the Court told the jury that they should allow interest on the value of the property taken,

and it is indeed a violent presumption to suppose that the jury, in figuring interest (if they did include interest in their verdict), would allow interest on the value of the stumpage at $1 per thousand and not allow interest on the profit. It is indeed a foolish argument to say that the jury took unto itself the authority to allow interest on only half the sum that the Court instructed them to allow interest on. The computation is further erroneous because the testimony discloses that the total amount of timber taken was 16,303,890 feet board measure. Of this quantity, 1,557,020 feet board measure was taken from the Edgar lands for which the defendant was liable at $10 per thousand feet, or a total sum of $15,570.20. We thus see that counsel, to suit their convenience in their computation, have ignored 303,890 feet board measure and have ignored entirely the manufactured value of the timber taken from the Edgar lands. And, again, their computation is erroneous because they only compute interest from the 1st of January, 1895, to the 1st of January, 1912, a period of 17 years. The complainant alleges that the cutting terminated on the 1st of January, 1895. The testimony discloses that the principal part of the cutting was prior to 1891, and counsel devoted 29 pages of their brief (pp. 127-156) in an attempt to convince this Court that the timber in the Big Blackfoot country was cut and removed prior to March 3, 1891. Again, we must do violence to presumption if we adopt the computation offered by counsel.

They only compute interest from 1895, whereas, according to their own argument, which finds some support in the evidence, the principal amount of timber was cut prior to March 3, 1891; and if the jury only allowed interest from January 1, 1895, they violated the instruction of the Court, for the Court told them clearly that the Government was entitled to interest from the date of conversion.

Now, let us take the other end of their computation, namely, the date, January 1, 1912, when they ceased to compute interest. This record shows that the case was submitted to the jury on Friday, February 7, 1913. If counsel are right in their calculations, the jury then failed to give the Government interest from January 1, 1912, until February 7, 1913, a year, one month and seven days, which likewise disregarded the instruction of the Court. We thus see that the whole calculation is erroneous and is simply a juggling of figures which have been adopted

by counsel without regard to the evidence or the instructions of the Court. We therefore submit that this sum represents the jury's idea of the damage suffered by the Government by reason of the conversion of the timber in question, and it is not for Counsel or the Court to indulge in speculation as to their method of calculation in order to reverse the judgment entered by the Trial Court.

Before closing this already lengthy brief, we desire to comment upon the testimony relative to the cutting on the Northwest quarter of Section 18,

Township 13 North, Range 14 West, known as the Kelly claim. Counsel seemingly make light of the testimony of James M. Boles (Tr. pp. 281-285). We submit that this witness, who resided on lands adjoining the Kelly claim and through whose barnyard the timber was hauled by the employees of this defendant, was better qualified to testify as to the date of the cutting than the prosperous farmers and school directors produced by the defendant and who merely knew the history of this tract of land from having lived in the neighborhood.

We also desire to supplement our statement with reference to the liability of the defendant by calling attention to the testimony of Thomas Hathaway (Tr. p. 236-9), who testified that the arrangements for the sale of the Bonita mill from Fred A. Hammond to George W. Fenwick were made by the witness under instructions and directions given by the defendant, A. B. Hammond.

We respectfully submit that this record discloses that the defendant was accorded a fair and impartial trial, that the instructions of the Court were eminently correct and that the verdict of the jury was proper and should not be disturbed.

Respectfully submitted,

Frank Hall,
Special Assistant to
the Attorney General.